United States Court of Appeals

for the Second Circuit

APPENDIX

76-2135

NO. 76-2135

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-2135

WILLIE ABRAHAM,

Petitioner - Appellant

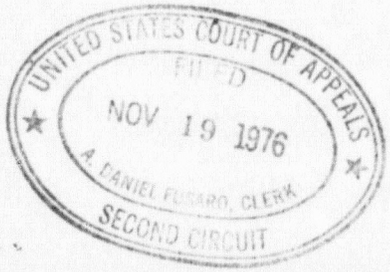
v

UNITED STATES OF AMERICA,

Respondent - Appellee

On Appeal from the United States
District Court for the Southern
District of New York (76 Civ. 978)

JOINT APPENDIX



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UNITED STATES DISTRICT COURT DOCKET DC-111

6-0978 Judge Bonsal Willie Abraham -vs- United States of America 76-0978

DATE	NR.	PROCEEDINGS
03-01-76	1	Filed complaint and issued summons.
03-02-76	2	Filed affidavit of W.Cullen Mac Donald in opposition to Petitioner's current petition.
3-12-76	3	Filed reply to Government's affidavit seeking to dismiss petitioner's motion.
3-15-76	4	Filed Notice that an evidentiary hearing will be held on 5-25-76 at 9:30 A.M. in courtroom 519. U.S.Atty will make appropriate arrangements so that petitioners may testify at the hearing. So ordered. Bonsal,J.
4-19-76	5	Filed pltff's reply to deft's affidavit Re: motion to dismiss.
4-30-76	6	Filed pltff's supplemental memorandum in support of his motion.
5-25-76	7	Before Bonsal,J. Non-Jury trial begun, this action consolidated with 76 Civ 1424 for trial. Trial concluded. Decision reserved.
6-16-76	8	Filed Petitioner's memorandum & Proposed findings of fact.
7-02-76	9	Filed Government's memorandum of law in opposition to motion to vacate sentences.
07 07-76	10	Filed reply to Govt's memo. of law in opposition to petitioners' motions to vacate their sentences.
7-23-76	---	Filed Transcript of record of proceedings dated 5-25-76.
9-14-76	(11)	Filed Memorandum #45077: Petitioners now move pursuant to 28 U.S.C. 225 for an order vacating the sentences & granting a new trial . The court denies petitioner's motions to vacate their sentences & or grant a new trial .So ordered. Bonsal,J. m/n
10-12-76	12	Filed pltff Willie Abraham's notice of appeal from an order entered 09-14-76 . copy mailed to U.S. Attorney S.D.N.Y.

76 Cir. 978

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILLIE ABRAHAM, :

PETITIONER :

V. : CIVIL ACTION NO._____

UNITED STATES OF AMERICA :

RESPONDENT :

MOTION TO VACATE SENTENCE
PURSUANT TO 28 U.S.C.,
SECTION 2255

I. JURISDICTION

Jurisdiction for the relief sought is grounded in 28 U.S.C. §2255, based upon a conflict of interest by trial counsel resulting in the ineffective representation of petitioner

II. FACTS

On October 16, 1972, a three count indictment was filed charging eighteen defendants with narcotic law violations. 72 Cr. 1159. Count One charged a conspiracy to distribute narcotics in violation of Title 21, U.S.C. Section 846. Count Two charged Willie Abraham with the unlawful promotion, supervision and management of a continuing narcotics criminal enterprise in violation of Title 21, U.S.C., Section 848. Count three charged all of the defendants with the unlawful use of a telephone in the commission of the offenses charged in the first two counts, in violation of Title 21, U.S.C. Section 843(b).

After a six week trial, ten of the defendants then in the case were found guilty by jury verdict -- of the remaining eight defendants, four - Sullivan, Hartley, Johnson and Bazemore - had their motions for acquittal granted, three -- Castalozzo, Owens and Sizemore - were fugitives, and one - Dingle - was severed prior to trial.

On June 26, 1973, Judge Frederick Van Pelt Bryan sentenced petitioner to a fifteen year term of imprisonment on count one, a consecutive four year term on count three, and, concurrent to both, a life term of imprisonment on count two. This latter sentence was subsequently reduced to twenty years imprisonment. An appeal taken from these convictions affirmed the judgement below, United States v. Sisca, 503 F.2d 1337 (1974), and a petition for a writ of certiorari was denied, 95 S.Ct. 328 (1974).

At the trial level Willie Abraham, along with Alphonse Sisca, Erroll Holder, Walter Grant, Robert Hoke and Margaret Logan were jointly represented by the law firm of Lenefsky, Gallina, Mass, Berne and Hoffman. They were also thus represented at the appellate level except for the representation of Erroll Holder by John L. Pollok, Esq. who had by that time left the firm.

On November 17, 1972, the Assistant United States Attorney in charge of the prosecution, W. Cullen MacDonald, Esq. filed an affidavit and memorandum of law concerning an apparent conflict of interest that existed because of the joint representation of six defendants in a narcotic conspiracy case by one law firm.

In his affidavit Mr. MacDonald noted that a waiver concerning a possible conflict of interest was apparently "not possible", unless independent counsel participated in that decision.

> "Indeed, the very fact of the same counsel's representation of successive links in a chain narcotics conspiracy could well inhibit the kind of frank disclosure necessarily a predicate to any informed legal judgment." at page 5.

In his memorandum in support of the motion, Mr. MacDonald noted at page two thereof

> "...it would seem clear that the six jointly represented defendants form at least three successive links in the distribution chain and perhaps more. Such varying roles give rise to interests which differ so significantly that multiple representation is, as hereinafter pointed out, inadvisable to say the least."

The government felt so strongly about this matter, that it took the position in its Argument portion of the memorandum that "the representation of multiple defendants at successive stages in a narcotics distribution chain, without any waivers, involves a conflict of interest "as a matter of law." (At page 3, emphasis supplied)

The commendable purpose of the government's motion was, no doubt, to protect the record against any future assaults thereon claiming a conflict of interest, by having separate counsel brought into the case or, more likely, by seeking an effective waiver from each of the six defendants. On this latter score, the government was firm in its belief that waiver "cannot be knowing and intelligent if based on the advice of the attorney held to be representing conflicting interests." at page 5.

Accordingly, the government stated that "the only way" for a valid waiver to occur would be to have independent counsel advise each of the six defendants concerning their respective waiver decisions.

At the hearing of this motion on November 22, 1972, Gino Gallina, Esq. represented all six of the defendants.

Mr. Gallina asserted that there was no problem concerning a conflict because none of the defendants intended to testify at trial and that after full discussion of the problem, all of the defendants agreed that having one firm represent them insured a coordinated defense for them all. (Tr. 6)

After Mr. MacDonald reiterated his position, the Court sought to effectuate waivers from each of the defendants.

The Court accordingly advised Mr. Sisca concerning a potential conflict of interest and whether or not he sought to retain present counsel. The Court propounded a series of questions to Mr. Sisca, all answered yes, followed by his decision to keep Mr. Gallina as his attorney along with the other defendants. (Tr. 22-24)

Next called to the bench was Willie Abraham who was advised as follows:

> "Q. Mr. Abraham, I'm sure by now you understand the nature of the charges against you.
>
> You are charged with conspiracy to violate the narcotic laws and violation of the narcotic laws and also, in a separate count, with the very serious offense of having engaged in massive activities of this nature in interstate commerce

which might subject you, if you were convicted, to a sentence of life imprisonment.

Do you understand that?

A. Yes.

Q. Now, you heard what I said to Mr. Sisca, did you not?

A. Yes, sir.

Q. I don't think it is necessary to repeat to you everything I said to Mr. Sisca, except to say to you that there is this possibility of a conflict of interest:

There is the possibility of a situation developing during the trial in which the best protection of your interests may be different from the protection of the interests of one or more of your co-defendants who is represented by the same counsel.

Do you understand that?

A. Yes, sir.

Q. And you, as I say, have the absolute right to have counsel of your own choosing. Do you understand that?

A. Yes.

Q. But, on the other hand, you are entitled to separate and individual counsel if you want it. If you don't want it, you can only have the Gallina firm representing you and the other defendants if you are fully cognizant and you are fully aware of the possibilities of conflict of interest and you of your own free choice and will decide to continue with them. Do you understand that?

A. Yes.

Q. With that in mind, what is your desire?

A. I would like to Keep Mr. Gallina.

Q. You want to keep the Gallina firm?

A. Yes.

Q. Despite the fact that they may be representing other co-defendants and a conflict of interest may develop?

A. Yes, sir.

THE COURT: All right, you may sit down Mr. Abraham, for the moment." (Tr. 24-26).

x x x

THE COURT: With reference to Messrs. Sisca, Abraham, Holder and Grant, will each of you answer this question: Gentlemen, have any threats or pressures been put on you to stay with Mr. Gallina's firm?

Defendant Sisca: No.

Defendant Abraham: No.

Defendant Holder: No.

Defendant Grant: No. (Tr. 31)

x x x

THE COURT: Will all of the six defendants in the courtroom rise at this point? I am addressing this question to each one of you...

THE COURT: I ask the same question of Mr. Abraham.

Defendant Abraham: Yes, sir.

THE COURT: Do you take drugs at any point?

DEFENDANT ABRAHAM: No.

THE COURT: Is your mind quite clear this morning? You are feeling physically all right?

Defendant Abraham: Yes, sir. (Tr. 34)

x x x

THE COURT: I am going to say this to each of the defendants: I want you to understand that by taking the position that you do this morning, that you want to continue with the Gallina firm representing all six of you despite what we talked about here earlier, that you are doing this for good. You are committing yourselves now and you are never going to be able to raise this question on appeal or any other time if something develops during the trial that is unfavorable to you. You have elected to keep the Gallina firm; do you understand that?

(Defendants answered in the affirmative.)

THE COURT: Do you understand that when the trial is over I am not going to have people coming back to me then and saying:I didn't like my counsel. I didn't like the way he represented me. I didn't like the way he represented me either?

You've got to fish or cut bait for good, you understand.

(Defendants answered in the affirmative.)

THE COURT: I think you all understand, but I will ask each of you....

THE COURT: Mr. Abraham, do you want to continue with the Gallina firm?

Defendant Abraham: Yes, your Honor." (Tr. 35-37)

After all was thus said and done to effect waivers, the government still had misgivings about the matter and was of the view that an effective waiver of the conflict of interest claim had not as yet been accomplished (Tr. 37-41)

Notwithstanding these government apprehensions at the conclusion of the hearing, the Court held that an election rather than a waiver was made by each of the defendants?

"The only thing I can do with such a free election is to recognize their right to make such a free choice and I will permit them to do so." (Tr. 41, 43)

The facts of the trial are readily summarized in the appellate briefs of the parties, and the opinions of the trial (361 F. Supp. 735 (1973) and appellate Courts. (503 F 2d 1337 (1974). The dominant legal issue was whether or not a waiver of the minimization question had occurred because of it being raised after commencement of the trial. The Court of Appeals specifically declined to rule on whether minimization had occurred and the appropriate remedy

to pursue for a failure to minimize (503 F.2d 1346). The Court affirmed that aspect of the judgment below holding that the defendants had knowingly waived their rights to challenge the admissibility of the wiretap evidence in that they deliberately failed to raise the claim of failure to minimize in a pretrial motion although specifically directed to do so by Judge Bryan.

The trial court had additionally held, that the minimization requirements had not satisfactorily been complied with, but that the 42 calls admitted at trial fell within the intercept order and should therefore, not be excluded from evidence. 361 F. Supp at 745-748.

The Court of Appeals was particularly sensitive to the timeliness of motions to suppress, for such intentionally tardy motions could effectively bar the government from appealing an adverse ruling. Furthermore, such tardiness coupled with an order suppressing the evidence could prevent the government from properly presenting its case to the jury.

> "Perhaps of chief importance, the timely disposition of such motions is critical to the orderly and fair administration of the criminal justice system itself. We will not countenance such deliberate and subtly disruptive tactics as those employed here." 503 F. 2d at 1349.

The trial court also alluded to the detriment accruing to the government by the mid-trial filing of these motions including, inter alia, the denial to the government of an opportunity to determine what evidence it can or cannot adduce at the trial in the light of the court's pretrial rulings; and, whatever legal consequences in terms of the due

process and double jeopardy clauses of the Constitution may result from the impanelment of the jury. 361 F. Supp. at 740.

These considerations can often be compelling especially when they intertwine as appears to be the case here, i.e. "[t]he evidence [was] derived largely from wiretaps and their fruits...." 503 F. 2d at 1339.

Of the 42 conversations admitted at trial, many were attributed to petitioner while only four of them were allegedly participated in by Alphonse Sisca who, along with Benjamin Castalozzo, were the top links between unknown sources and the the day to day operations directed by petitioner, i.e., Sisca and Castalozzo were petitioner's suppliers. 503 F. 2d at 1339-1341.

At trial, counsel for defendant Sisca presented four voice identification experts who testified that the four telephone conversations attributed to Sisca, were not made by him. The jury acquitted Sisca of use of a telephone to further narcotic law violations.

On December 13, 1971, Sisca allegedly called petitioner and agreed to meet at 5:00 p.m. at the same place. Abraham was followed to the meeting place where he was seen meeting with Sisca and Castalozzo. Counsel for Sisca presented two lighting experts who

> "analyzed the lighting and street conditions in existence at the Albert Einstein Hospital, where the meeting took place, and along the departure route followed on December 13, 1971, and expressed their opinion that all three officers observations should be rejected, including particularly the testimony positively identifying Sisca in the passenger seats of both the Abraham and Costalozzo automobiles." Government's brief on appeal at page 12.

Counsel for Sisca also presented a partial alibi witness for the jury concerning the night of November 15, 1971.

Defendant Hoke presented a partial alibi defense. Eugene Rainey, a bartender, testified that Hoke left his bar at 4:30 a.m. on December 15, 1971, in an intoxicated state. Hoke's teenage son testified that he was awakened by his father and mother arguing at their home at 461 Olmstead Avenue, at approximately 5:00 a.m. that morning. The other four defendants -- including petitioner -- who were represented by the same law firm as Sisca and Hoke presented no evidence and all six of them did not testify at trial.

III. LAW

A. Prejudice to Petitioner Because of The Conflict of Interest Is Clearly Established in The Record.

In United States v. Lovano, 420 F. 2d 769, 773 (2d Cir. 1970) it was held that:

> "in this circuit...some specific instance of prejudice, some real conflict of interest, resulting from a joint representation must be shown to exist before it can be said that an appellant has been denied the effective assistance of counsel."

In Morgan v. United States, 396 F. 2d 110 (2d Cir. 1968), the Court remanded the case for a hearing after petitioner's third 2255 was denied because "Turk [trial counsel] represented both Morgan and Stein on appeal from the convictions, and Morgan has not had separate independent counsel to raise these questions for him until this third application was filed." 396 F. 2d at 113. "[T]he effective assistance of counsel is so important and paramount a right for a defendant on trial for a serious crime that we are not entitled

to assume, merely because there is such substantial support for the conviction, that the defendant was, in fact, adequately represented by counsel". id at 115. Compare, United States v. Badalamente, 507 F. 2d 12, (20-21) (2d Cir. 1974,)(No prejudice shown); with, United States v. DeBerry, 487F2d 448 (2d Cir. 1973) (Prejudice shown). See also, United States v. Alberti, 470 F.2d 878 (2d Cir. 1972).

In the recent case of United States v. Mari, 526 F. 2d 117 (2d Cir 1975), the Court affirmed the denial of a motion under 28 U.S.C. §2255 in that no prejudice appeared because of the joint representation of two defendants by one counsel when both defendants pleaded guilty.

Judge Oakes in concurring alluded to the Lovano line of cases requiring a specific showing of prejudice or a real conflict of interest resulting from joint representation of codefendants before a Sixth Amendment violation could be established, but nonetheless observed:

> "The time is rapidly approaching however, when, in the light of more exacting standards of the Bar and the decisions of other leading courts, we may have to reexamine our rule." 526 F. 2d at 119. (Citing ABA Standards Relating to the Prosecution Function and the Defense Function § 3.5 (Approved Draft 1971) at 211, 213)
>
> "It also makes no difference whether counsel is appointed by the court or selected by the defendants; even where selected by the defendants the same dangers of potential conflicts exist, and it is also possible that the rights of the public to the proper administration of justice may be affected adversely." id., at 121.

In the case at bar the record reveals that the people at the top of this conspiracy were Sisca and Castalozzo - the latter being a fugitive at the time of trial.[1/] Beneath them

1/ It is our understanding that he has recently been apprehended.

in the chain was petitioner, who, as his affidavit reveals never knew Mr. Gallina until he had been arrested. Upon his arrest, Mr. Gallina approached him as counsel after being instructed to do so by Mr. Sisca. It can thus be inferred that prior thereto, the Gallina firm and Mr. Sisca had an attorney -client relationship which, at the very least, would place Mr. Sisca, psychologically at the top of counsel's list in the order of priorities.

In a complicated conspiracy case when many intricate and varied trial and pretrial judgments had to be made, the instant situation was rife with the potential for conflicts between clients to arise. Indeed, realizing this, the government herein took the position in its pleading of November 17, 1972, that the joint representation by one law firm of six defendants engendered "a conflict of interest as a matter of law." (at page 3)

An assertion it can not now easily disavow.

Defense Counsel[2/] knew that the evidence against defendant Sisca was relatively weak, while the evidence against petitioner was of a more substantial nature. The only avenue available for petitioner leading to acquittal was for counsel to file a pretrial motion to suppress the evidence based on the failure of the agents to "minimize" the wiretap -- a course

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2/ When we speak of defense counsel we refer specifically to Mr. Gallina who, the record reflects was the so-called lead lawyer in the case and upon whom petitioner actually relied for legal guidance.

suggested by the trial court but never followed. 361 F. Supp. 739. We perceive no viable trial strategy in failing to file such a timely motion on behalf of Mr. Abraham. Cf. 503 F. 2d at 1348 (f.n. 15) On the other hand, two reasons appear why such a motion might have been tardily filed -- either of which results in a Sixth Amendment deprivation of petitioner's right to counsel under the test extant in this Circuit.

1. The trial herein was originally set for January 3, 1973, and after two pretrial conferences -- December 27, 29, 1973, was adjourned until January 15, 1973. 361 F. Supp 739. During this very time span counsel for Mr. Sisca and/or the law firm was quite busy preparing his defense to the four wiretaps allegedly recording Sisca's voice. As Mr. Gallina's brief in the Court of Appeals indicates, on December 28, 1972, defendant Sisca and his counsel consulted with voiceprint technician Linda Chiari to make certain tape recordings. She was again similarly consulted on January 4, 1973. On January 10, 1973, Doctor Louis J.Gerstman, another voice expert was personally consulted by Mr. Sisca to prepare for trial. "In early January 1973," Mr. Sisca met with Dr. Oscar Tossi another voice identification expert, at the latter's laboratory at Michigan State University. (Appellant Sisca's brief at pages 19-22). It is thus a legitimate inference that counsel was so busy with Mr. Sisca's defense that the rights of petitioner were allowed to slip away unnoticed. In these circumstances, who can say that Mr. Abraham was not severely prejudiced by this joint representation.

As the Seventh Circuit recently stated:

> "The Sixth Amendment's guarantee of Assistance of Counsel necessarily reugires that a criminal defendant be represented not only by counsel satisfying at least a minimum standard of professional competency,... but also by counsel whose undivided loyalties lie with his client.... Such representation is lacking if counsel, unknown to the accused and without his knowledgeable assent, is in a duplicitous position where his full talents as a vigorous advocate having the single aim of acquittal by all means fair and honorable are hobbled or fettered or restrained by commitments to others." United States ex rel. Robinson v. Housewright, 525 F. 2d 988, 992 (7th Cir. 1972)

At bottom, it is unthinkable that if petitioner had one attorney dedicated to his interests alone, that such attorney would have foregone the timely filing of a pretrial "Minimization" motion after being put on notice by the trial court to do so. The division of labor herein between six defendants by one firm most surely worked to petitioner's disadvantage. Obviously, the risk of prejudice to an accused jointly represented increases in direct proportion to the complexities of the case and the length of the projected trial. One facing life imprisonment should not be obligated to run the risk that all will go well at every stage in a complicated criminal process when multiple defendants with possibly divergent interests are championed by but one advocate-absent, of course, his assumption of that risk.

2. As previously indicated, the case against defendant Sisca was relatively thin and counsel knew that that client had an excellent chance of acquittal if the alleged tapes of his voice were admitted into evidence. Indeed, he was acquitted on the use of the telephone count

but, unfortunately for him, that did not have the anticipated spill-over effect into the conspiracy count.

Even if the tapes were suppressed, Sisca might have been more disadvantaged thereby than if they were admitted into evidence. By the untimely raising of the minimization issue, Mr. Sisca could effectively have his cake and eat it too. I.e., if the motion were granted, the government was precluded from appealing the issue and a major part of its case against all would have been eliminated, by thus gambling and losing, Mr. Sisca would still have been in the enviable position of being able to seriously contest the voice on the tapes as being his -- a position not to be shared by petitioner. The Court of Appeals has already branded this tactic as "deliberate and subtly disruptive." 503 F. 2d at 1349. Thus, was engendered a true conflict of interest between Mr. Sisca and the other defendants because of this deliberate tactic on behalf of the former which certainly prejudiced Mr. Abraham.

At the bottom line, failure to file a pretrial minimization motion on behalf of petitioner was, standing alone, probably a violation of petitioner's right to the effective assistance of counsel.

In United States vs. Olsen, 453 F. 2d 612 (2d Cir. 1972), three defendants were jointly represented by single appointed counsel. The Court reversed the conviction of Olsen because on the critical issue of probable cause, counsel did not as strongly pursue the invalidity of Olsen's arrest as he did with his other two clients and thus, the

appellate court was forced to conclude that "Olsen may have been prejudiced by the joint representation." 453 F.2d at 616. In United States ex rel. Hart v. Davenport, 478 F.2d 203 (3d Cir. 1973) a single defense attorney retained by Hart's co-defendant employers, represented him, the two employers and three other codefendants. No timely motion in that lottery case was made on his behalf or of anyone else even though the affidavit in support of the warrant was "palpably insufficient." The attorney during the trial was mainly concerned with defending the employers against the charges.

> "Here again, the predicament of counsel becomes clear for any effort to negate Hart's connection with Exhibits S-9 and S-10 would have the inevitable tendency to focus attention on Battersby's role as a proprietor of a gambling enterprise as well as a bar and grill". 478 F.2d 208.

In ordering a new trial the Court observed that

> "the right to counsel...contemplates the service of an attorney devoted solely to the interests of his client. The right to such untrammeled and unimpaired assistance applies both prior to trial in considering how to plead,...and during trial...." 478 F.2d 210.

Furthermore, this Court has ruled that minimization did not occur here. 361 F. Supp. at 745. It makes no difference that it additionally held that the 42 taped conversations were nonetheless admissible in evidence. For the effective assistance of counsel is to be viewed at that moment in time when judgments are actually made and, as this Court noted, at that time United States v. Scott, 331 F. Supp. 233 (D.D.C. 1971) held that if minimization requirements are not met, total suppression of all calls should ensue. 361

F. Supp. at 747. An issue not yet decided by the Supreme Court.

Additionally, it should be noted that an important aspect of counsel's task in any case is plea bargaining -- especially where a defendant faces life imprisonment. We see from petitioner's affidavit that law enforcement officers were keenly interested in his cooperation vis-a-vis defendant Sisca and others. This whole area of bargaining for a lesser sentence than life was effectively cut off from petitioner because his counsel could not be in the middle of trading off one client for another and when the law firm obviously sought to insulate Mr. Sisca from the adverse testimony of any of the other clients.

At the conflict of interest hearing of November 22, 1972, Mr. Gallina himself alluded to the persistent efforts of the government to secure petitioner's cooperation. (Tr. 19-22) While not saying that petitioner would have cooperated with the authorities the then present conflict of interest prevented that avenue of penalty reduction from being pursued.

When all is said and done, we believe that an effective showing of a conflict of interest and prejudice to petitioner has been demonstrated by this record.

Unfortunately for petitioner, however, the route to a new trial is not yet secured because of the anticipated claim by the government that a waiver of this issue was occasioned on November 22, 1972.

B. The Hearing of November 22, 1972 Failed to Produce A Meaningful Waiver By Petitioner of His Right to Be Represented By Unbiased Counsel.

In limine, we agree with the prosecutor's contemporaneous judgement that the inquiry of November 22, 1972, was inadequate to secure an effective waiver herein. (See tr. 37-38, 40) We also agree with his affidavit to the effect that

> "it would appear that, absent independent counsel concerning that decision a knowing and intelligent waiver finding is not possible. Indeed, the very fact of the same counsel's representation of successive links in a chain narcotics conspiracy could well inhibit the kind of frank disclosure necessarily a predicate to any informed legal judgment." at page 5.

As petitioner's affidavit reveals, he affirmatively sought to keep counsel upon inquiry by the Court more out of fear of what would happen if the defendants were split apart, than upon the basis of an informed judgment. The very ingredients that led to a conflict of interest herein culminated in counsel's advice to petitioner to stay together lest one defendant inform on the other. As we have demonstrated earlier, this advice was, no doubt, intended to protect Mr. Sisca and thus, the conflict of interest infected the very waiver itself and rendered it of no moment. This problem exists in every conspiracy case and places an exceptionally heavy burden upon the trial court to secure constitutionally valid waivers re conflicts of interest.

One may then ask: Does this mean that there can never be a valid waiver in this type of situation? The answer is, there can be and one way to secure it is through the advice

of independent counsel as suggested by the government. Another method would be through a meaningful dialogue with the defendant not restricted to yes or no answers but intended to assure the Court that the defendant truly understands what he is doing. CF United States v. Liddy 348 F. Supp.198 (D.D.C. 1972), wherein Judge Sirica found a valid waiver re joint representation after each defendant submitted sworn affidavits stating that he discussed the case in detail with counsel, and was aware of his right to separate and independent counsel. Furthermore, the defendants had consulted with other attorneys on the matter, wished to keep their present attorney and no conflict of interest appeared at that time. If matters changed, however, the Court kept open the possibility of reconsidering its ruling at a later time.

In this case, however, the purported waiver was but a charade acted out by the parties as a consequence of that very conflict of interest. In United States v. Sheiner, 410 F. 2d 337 (2d Cir./1969) the Court upheld the judgment below to the effect that a valid waiver had occurred. In that case, however, the defendant consulted with two other attorneys prior to the waiver.

> "It is apparent from the foregoing that Sheiner was alerted to the possible desirablity of retaining separate counsel and that substantial consideration had been given to the matter." 410 F.2d at 342.

Furthermore, even absent a waiver, the prejudice was at best minimal and probably not prejudicial in Sheiner.

In United States v. Wisniewski, 478 F.2d 274 (2d Cir. 1973) the waiver was effected in a fashion similar to the

one at bar. The Court observed, however, that being aware of the problem, both the trial court and the government repeatedly sought to ferret out from the defendants and their retained common counsel whether there were facts or separate defenses indicating the necessity for separate representation. 478 F. 2d at 281. In the case at bar there was no effort to determine if the petitioner understood how a conflict might arise. Furthermore, in Wisniewski, it was not claimed that the purported waiver was but a charade engendered by an already existing conflict of interest as is the case here.

In United States v. DeBerry, supra, the Court held that an insufficient inquiry had been undertaken by the Court to effect a waiver. In any event, after counsel indicated that one defendant would not incriminate the other if he testified, just the opposite occurred. The Court also indicated that the mere statement of counsel standing alone was inadequate to effect a waiver, absent a personal interrogation of the individual defendants by the trial court.

Of importance in considering this question are the cases of United States v. Alberti, 470 F. 2d 878 (2d Cir. 1972) and United States v. Vowteras, 500 F. 2d 1210 (2d Cir. 1974).

In Alberti, the appellate court indicated that at a hearing on a conflict of interest question the trial judge "should see that the defendant is fully advised of the facts underlying the potential conflict and is given an opportunity to express his or her views."

In the case at bar the Court was alerted to the factual basis for an actual conflict of interest from two sources: 1. the government motion indicating the need for independent counsel because of the very nature of this conspiracy case and 2. the statement by Mr. Gallina that the government had previously sought out Mr. Abraham as a potential government witness. From this it became apparent that a conflict might arise in seeking to protect one or more defendants from the testimony of a codefendant and that the responses to the Court's questioning might very well be a product of that conflict. Because petitioner was not advised of these facts underlying the potential conflict by the Court or independent counsel, he could not and did not have an opportunity to express his views on the matter as suggested by Alberti.

Assuming arguendo that a valid waiver occurred on November 22, 1972, we believe that the Vowteras case clearly suggests a new trial herein. In that case a valid waiver was deemed to have occurred after the matter was carefully examined by the trial court on two separate occasions. Notwithstanding this waiver the Court stated that the defendants "cannot now repudiate their choice in the absence of a credible showing of some specific instance of prejudice, some real conflict of interest, resulting from a joint representation." 500 F.2d at 1211. Thus, a waiver valid at the time will not preclude a new trial if a defendant is in fact harmed by a true conflict of interest. In the instant case, any waiver on November 22, 1972, could not insulate the conviction because of prejudice accruing to the petitioner almost two

months later when an untimely motion to suppress evidence was urged and denied. No matter how sophisticated or not petitioner may be, he could not have augured on November 22, 1972, what was yet to come as a result of the ever present conflict of interest. Cf. United States v. Liddy, supra.

The most exhaustive treatment of the waiver question is to be found in the case of United States v. Garcia 517 F. 2d 272 (5th Cir. 1975).

In that case the trial Court held that a conflict of interest existed which could not be waived and ordered the defendants to obtain new counsel. An interlocutory appeal ensued and the Court then carefully considered the issue of Waiver.

> "Because of the unchallenged importance of the need for adequate representation during criminal proceedings, we direct the District Court to scrupulously evaluate the insistence of the defendants on the right to privately retained counsel of their own choice even though the district court may discern a conflict of interest in such representation. In addition, the court must also carefully evaluate the persistent efforts of the defendants to waive any imperfections in such representation which may be apparent to the court. The trial court should actively participate in the waiver decision....
>
> The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included...and all other facts essential to a broad understanding of the whole matter....
>
> As in Rule 11 procedures, the district court should address each defendant personally and forthrightly advise him of the potential dangers of representation by counsel with a conflict of interest. The defendant must be at liberty to question the district court as to the nature and consequences of his legal representation. Most significantly, the court should seek to elicit

> a narrative response from each defendant that he has been advised of his right to effective representation, that he understands the details of his attorney's possible conflict of interest and the potential perils of such a conflict, that he has discussed the matter with his attorney or if he wishes with outside counsel, and that he voluntarily waives his Sixth Amendment protections....
>
> Mere assent in response to a series of questions from the bench may in some circumstances constitute an adequate waiver but the Court should nonetheless endeavor to have each defendant personally articulate in detail his intent to forego this significant constitutional protection."

See especially, Von Moltke v. Gillies, 332 U.S. 708, 724 (1948); Glasser v. United States, 315 U.S. 60.

When measured against this standard for waiver, it is clear that even on the face of it -- without considering the charade aspects of the proceeding -- no intelligent waiver can be deemed to have occurred here. The Court in Garcia exacted these onerous requirements before a waiver could occur because it believed full well that representation by an attorney with a conflict of interest might be worse than having no legal counsel at all, for such an attorney could very readily not only not work for his client's betterment, but indeed, might insure his conviction through inadvertance or otherwise.

CONCLUSION

Wherefore, for the reasons states we urge the Court to vacate petitioner's sentence pursuant to 28 U.S.C. §2255 and grant him a new trial.

Respectfully submitted,

Morton Katz
15 Park Row
New York, New York 10038
212-CO 7-6016

Allan M. Palmer
1707 N Street, N. W.
Washington, D. C. 20036
202-785-3900

CERTIFICATE OF SERVICE

I hereby certify that I have personally served a copy of the foregoing pleading on the office of the United States Attorney, One St. Andrews Plaza New York, New York, this / day of March, 1976; including a copy of the affidavit of Willie Abraham attached to said pleading.

Allan M. Palmer

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILLIE ABRAHAM, PETITIONER	:	
V.	:	CIVIL ACTION NO.
UNITED STATES OF AMERICA RESPONDENT	:	

AFFIDAVIT

Willie Abraham, deposes and says the following according to his knowledge, belief and best recollection:

1. I was one of the defendants convicted in 72 Cr. 1159. (Southern District of New York.)

2. My original arrest leading to the present indictment occurred on December 15, 1971, for New York State narcotic charges. Present at and participating in that arrest were state and federal law enforcement officers. I was taken to a police precinct and questioned concerning Alphonse Sisca, Arnold Squitteri and others about narcotics traffic. I was told that if I cooperated with the police, I could receive little or no jail time, otherwise I would go to jail for a long time.

21 Dec 71

3. The same day as my arrest, attorney Gino Gallina came to talk to me at the precinct and said that Mr. Sisca and others had sent him over so that he could represent me after they saw my arrest on television. Before December 15, 1971, I never knew or had seen attorney Gallina. Since that time, however, Mr. Gallina has been my lawer for state and federal charges against me.

4. I was in jail about one week before I got out on bail, during which time I saw Mr. Gallina frequently. I told him that during that week the state district attorney had questioned me about Sisca and Squitteri and again said I would get little or no time if I informed and that my bail would be lowered. I believe it was $150,000 at that time. Mr. Gallina told me to keep quiet and not inform on anybody.

5. After I was released on bail I was locked up the next morning on federal charges by the task force and taken to Foley Square where I was held for about 8 - 10 hours. During that time I was asked to inform on Mr. Sisca and Mr. Squitteri and anybody else I knew about concerning drugs. I was told that if I did, I probably wouldn't have to do more than eighteen months in jail but that there was the possibility I might not be indicted at all. They also told me that if I did inform, I would have to stay in federal custody until the cases were over against whoever I gave up, and that the government would relocate me and my family and give me a new name.

After many hours, Mr. Gallina found me in the prosecutor's office at Foley Square. He advised me to play along with the government and make it seem that I was going to cooperate so that the bail might be reduced, but that I should really say nothing about anybody.

6. That case, paragraph 5, was dismissed and I was again arrested on federal charges when I was indicted in this case in October of 1972.

7. I was notified by Mr. Gallina to be in his office along with co-defendants Walter Grant, Robert Hoke, Erroll Holder and Margaret Logan on the morning of November 22, 1972. We did appear there although Mr. Sisca was not present. We were all spoken to as a group and told by Mr. Gallina that the government was trying to hurt our defense by breaking us up. He told us that the prosecutor had asked the Court to bar Mr. Gallina and his firm from representing all of us. We were told that we had a good chance to win the case on a wiretap motion, and that if the government prevented the Gallina firm from representing all of us, then the government would have an unfair advantage and easily convict everybody. We were told that if we had new and separate lawyers there was a good chance codefendants would start talking against each other and some of us would then be in trouble and probably go to jail.

We were told that we were going to Court and that the Judge was going to ask us questions about whether or not we wanted new lawyers and we were instructed to say that we

understood what the Court was telling us, but that we all wanted to stay with the Gallina firm. That is exactly what I did when asked the questions by the Court on November 22, 1972. I did so because I thought the government was trying to trick us out of beating the case.

At no time before or during the hearing of November 22, 1972, did Mr. Gallina advise me or anybody else what a conflict of interest was, how it might come up in this case or how a conflict of interest could lead to a bad defense for me. At no time before or during the hearing did Mr. Gallina show us the affidavit or motion filed by the government concerning a conflict of interest or read it to us or otherwise explain it. Before and after November 22, 1972, affiant had no personal knowledge of what a conflict of interest was, or how it could specifically come up in this case.

Because of counsel's advice I was afraid of being convicted if anyone else but Mr. Gallina and his law firm represented us in this case and for that reason and that reason alone told the court that I wanted to keep the Gallina firm on November 22, 1972.

8. Although another member of the Gallina firm actually represented me and two others in Court in this case (Mr. Jeffrey Hoffman) I always considered Mr. Gallina to be my lawyer and any time something important came up about the case, I always spoke to Mr. Gallina about it in addition to Mr. Hoffman. Before going to Court on November 22, 1972, the only lawyer who advised us was Mr. Gallina.

9. Although this affidavit was prepared by Allan M. Palmer, Esq. the facts contained therein were related to Mr. Palmer by affiant. I have read this affidavit carefully,and believe it to be true to my knowledge and belief and best recollection.

S/ Willie Abraham
Willie Abraham

Personally appeared before me this day Willie Abraham (affiant) who being duly sworn, stated that the foregoing facts are true and correct to the best of his knowledge, information and belief.

This the 1 day of March, 1976:

/S/ Edward T. Cart, Jr.
(Notary Public)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILLIE ABRAHAM,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

AFFIDAVIT

76 Civ. 978 (DBB)

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

W. CULLEN MAC DONALD, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, and, as such, have been assigned and am familiar with the above-captioned matter. This affidavit is submitted in opposition to the current petition which in the Government's view, should be dismissed without a hearing.

2. Indictment 72 Cr. 1159 in three counts, was filed on October 16, 1972, and charged the petitioner WILLIE ABRAHAM with conspiring to distribute narcotics, use of the telephone for such purposes and managing a continuing narcotics criminal enterprise in violation of Title 21, United States Code, Sections 846, 843 and 848, respectively. Trial commenced on January 16, 1973, and concluded on February 23, 1973, before United States District Judge Frederick Vp. Bryan with a jury verdict of guilty

on each count. On June 26, 1973, Judge Bryan sentenced ABRAHAM, concurrently on each count, fifteen years on Count One, four years on Count Two and life imprisonment on Count Three. On May 10, 1974, the United States Court of Appeals for the Second Circuit affirmed the judgment of conviction on all counts, and, thereafter, the United States Supreme Court denied ABRAHAM'S petition for a writ of certiorari. Those decisions are reported at United States v. Sisca, 503 F.2d 1337 (2d Cir.), cert. denied, 419 U.S. 1008 (1974). Thereafter, Judge Bryan reduced ABRAHAM'S sentence on Count Three to a twenty year concurrent term of imprisonment.

3. On November 17, 1972, the Government moved for the entry of an order resolving the representation of conflicting interests by the firm of Lenefsky, Gallina, Mass, Berne and Hoffman which by then had entered notices of appearance on behalf of ABRAHAM and five of his co-defendants, Sisca, Logan, Holder, Grant and Hoke. On November 22, 1972, following a hearing on said motion, the District Court denied the Government's motion in all respects. The transcript of said hearing is submitted herewith.

4. At the trial herein, Jeffrey Hoffman, Esq. represented the petitioner ABRAHAM and his co-defendants Logan and Holder, while his partners and associates represented several of the co-defendants as follows:

Defendant	Counsel
Sisca	Gallina
Hoke	Kiernan
Holder	Pollak

5. Numerous pre-trial motions were filed on behalf of ABRAHAM and every other defendant in the case at various times through the eve of trial. Following the trial, the District Court permitted ABRAHAM and his co-defendants a further opportunity to secure the suppression of evidence on grounds not advanced until the trial began (United States v. Sisca, 361 F. Supp. 735 (S.D.N.Y. 1973)).

6. As Judge Bryan indicated from the bench on November 22, 1972, in denying the Government's motion, ABRAHAM'S election to continue his retention of the same firm of attornies as five of his co-defendants was knowing, intelligent and under the circumstances binding upon him. Judge Bryan's warnings squarely tracked the controlling authority, United States v. Sheiner, 410 F.2d 337 (2d Cir. 1969).

> "THE COURT: As I read United States v. Shiner (sic), there the conviction was upheld on a waiver practically the same as the one we are conducting this morning, if it could be called a waiver. I would call it an election rather than a waiver, a specific deliberate election on the part of these defendants" (Transcript of Proceedings, p. 41).

The petitioner's current affidavit wholly fails to allege any facts to establish that some different standard of inquiry should have been employed here. No allegation, for example, is made that a co-defendant was paying for ABRAHAM'S representation and, indeed, reliable Governmental sources advise that it was ABRAHAM himself who retained the firm on behalf of several of his co-defendants. No allegation is made that he did not understand Judge Bryan's

repeated open court warnings that multiple representation "might hurt one defendant and not hurt the other" (Transcript, p. 23), that "this is a dangerous thing from the standpoint of the individual's rights" (Id.), and that their election would foreclose post-trial claims "on appeal or at any other time" (Id. at p. 36) of ineffective assistance of counsel. Instead, he only states that Mr. Gallina failed to explain to him what a conflict of interest was (Affidavit, p. 3). That conclusory allegation should be compared with Mr. Gallina's open court statement, in ABRAHAM'S presence, that he had advised ABRAHAM and his co-defendants that there might develop "a conflict of interest between one to the other" (Transcript of Proceedings, p. 6).

7. Finally, it need only be noted that the sole prejudice claimed is a failure to include the minimization ground, in addition to the several others advanced in support of his motion to suppress the wiretap evidence, which was said, so the argument was, to be a deliberate tactical decision by Sisca in order to keep admissible the tape recordings of his conversations with ABRAHAM so that he could thereafter offer expert proof that the Government's identification of his voice was incorrect. Given the patent insufficiency of the Government's prima facie case without such proof, it is simply too far fetched to imagine that Sisca would deliberately supply the critical missing link in the Government's case in order to be able to offer rebuttal evidence. The petition's weakness in this regard is perhaps the best proof that ABRAHAM was vigorously

represented throughout the proceedings; indeed, perhaps more vigorously than these five co-defendants.

WHEREFORE, the Government respectfully requests that the petition be dismissed without a hearing.

W. CULLEN MAC DONALD
Assistant United States Attorney

Sworn to before me this
1st day of April, 1976.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Willie Abraham,	:	
Petitioner	:	
v.	:	76 Civ. 978
United States of America	:	
Respondent	:	

Reply To Government's Affidavit
Seeking to Dismiss Petitioner's
Motion Pursuant to 28 U.S.C. § 2255.

Perhaps the most suitable response to the affidavit of W. Cullen MacDonald, Esq., dated April 1, 1976, put forth in opposition to the instant motion of Willie Abraham, is to be found in the pleadings and importunings of W. Cullen MacDonald, Esq. in November of 1972, when the relevant issues and their resolution were apparently clearer in his mind.

Presently, Mr. MacDonald urges that the proceedings before Judge Bryan on November 22, 1972, were adequate to effect a waiver of the extant conflict of interest although Mr. Gallina then represented all six defendants.

By affidavit dated November 16, 1972, he observed, however, just the opposite:

> "To the extent that a 'waiver' claim of justification may be asserted, it would appear that, absent independent counsel concerning that decision, a knowing and intelligent waiver finding is not possible." (pg. 5)

In his accompanying memorandum of law, Mr. MacDonald stated -- as we do now -- "as to waiver, the government submits that such cannot be knowing and intelligent if based on the advice of the attorney held to be representing conflicting interests." (Pg. 5)

Indeed, at the waiver hearing itself of November 22, 1972, Mr. MacDonald's gut reaction was that effective waivers had not, in fact, been accomplished via Judge Bryan's questioning of the defendants. (Tr. 37-41)

We agree -- especially in light of United States v. Garcia, 517 F. 2d 272 (5th Cir. 1975), which was augured by government counsel three years ago.

Mr. MacDonald, representing the government, now asserts that petitioner's claim that he was not fully advised as to what a conflict of interest was, is inadequate, especially in light of Mr. Gallina's open-court statements to the effect that he had advised all of the defendants that a conflict of interest might develop.

Petitioner urged in his pleading that that very waiver hearing was a sham engendered by the conflict of interest and that he was but mouthing answers fed to him by counsel.

In 1972, Mr. MacDonald, still representing the government, foresaw, however, the very dangers of a sham waiver proceeding that actually came to pass herein.

In his affidavit of November 16, 1972, he urged:

> "Indeed, the very fact of the same counsel's representation of successive links in a chain narcotics conspiracy could well

inhibit the kind of frank disclosure necessarily a predicate to any informed legal judgment." (Pg. 5)

His accompanying memorandum of law was even more pointed on the issue:

> "It would seem self-evident that the relatively more severe penalties in narcotics cases would tend to enhance the ever present intra-intimidation between co-conspirators to maintain the silent integrity of the conspiracy. And, all too frequently, violent means are employed by the leaders at the top of the narcotics distribution chain .... Here, there probably not being full disclosure by any of the lesser clients in the first instances, it cannot be doubted that such uninformed consent is not adequate protection." (Pgs. 3, 8)

Indeed, in this very case the "leaders at the top" were identified by the United States Court of Appeals for the Second Circuit as "Sisca and one Benjamin Castalozzo". 503 F.2d at 1339. Mr. MacDonald at no point seeks to dispute Mr. Abraham's affidavit to the effect that prior to his arrest on December 15, 1971, Mr. Abraham never knew or had seen attorney Gino Gallina and that the latter had been "sent" over to represent him by Sisca and others.

At paragraph 7 of his affidavit Mr. MacDonald deals with the question of prejudice to petitioner and, as we would expect, finds none. His argument appears bottomed on the premise that there could be no <u>deliberate</u> tactical decision on behalf

of Mr. Sisca to forego a pre-trial minimization motion and that failure to so file in some magical way demonstrates that "Abraham was vigorously represented throughout the proceedings; indeed, perhaps more vigorously than these five co-defendants." This is patent nonsense.

In the first place, the suggestion by the government that failure to file a pre-trial minimization motion was not deliberate is interred by the judgment of four federal judges:

> "An adverse ruling on a pre-trial motion will permit the government to change the theory of its case, to develop or place greater reliance upon untainted evidence or otherwise, to modify its trial strategy. When the deliberate trial strategy of defense counsel is to obtain such a ruling only during or after trial, this flexibility obviously is lost.... We will not countenance such deliberate and subtly disruptive tactics as those employed here....
>
> We hold that appellants, by ignoring the district court's explicit directive to make their minimization motions before trial, elected to pursue a trial strategy of intentional relinquishment of a known right ...." United States v. Sisca, 503 F.2d 1348 - 1349. (Footnote omitted) See United States v. Sisca, 361 F. Supp. 740-741.

We challenge the government to demonstrate how this deliberate tactic could help the defense of Willie Abraham! As asserted in our petition, the only defendant to benefit thereby was Mr. Sisca. If the motion were granted, a government appeal

was gone; if denied, only he could challenge the voice identification.

At paragraph 7 of his affidavit Mr. MacDonald asserts that [g]iven the patent insufficiency of the government's prima facie case without such proof, it is simply too far fetched to imagine that Sisca would deliberately supply the critical missing link in the government's case in order to be able to offer rebuttal evidence."

Ignoring for the moment the fact that this cursory argument bypasses the main thrust of our position, this very allegation by government counsel is obviously made without careful reading of the appellate court's opinion herein, which, in our judgment, completely scuttles Mr. MacDonald's present position. At footnote 15 Judge Timbers observed for the Court, 503 F.2d at 1348:

> "Secondly, we do not know whether the government had clearly untainted evidence, which, because of appellants' failure to make timely motions to suppress on minimization grounds or for strategic reasons, the government had no occasion to introduce."

And, at the trial and pre-trial stage of the proceedings we are concerned with, neither did Mr. Sisca.

Conclusion

When all is said and done we think it clear that petitioner is entitled to the relief he seeks and since his factual allegations are not sought to be controverted by the

government, this should be accomplished without the need for a hearing.

Respectfully submitted,

Morton Katz
15 Park Row
New York, New York 10038
CO 7-6016

Allan M. Palmer
1707 N Street, N.W.
Washington, D.C. 20036
785-3900

CERTIFICATE OF SERVICE:

I hereby certify that I have mailed, postage prepaid, a copy of the foregoing pleading to the following persons this day of April, 1976.

1. Office of the Clerk
   United States District Court
   Southern District of New York
   Foley Square
   New York, New York 10007

2. W. Cullen MacDonald, Esq.
   Assistant U.S. Attorney
   One St. Andrews Plaza
   New York, New York 10007

_____
Allan M. Palmer

Conflict

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
-v-	:	72 Cr. 1159
ALPHONSE SISCA, et al.,	:	
Defendants.	:	
	:	

GOVERNMENT'S MEMORANDUM IN SUPPORT OF ITS MOTION CONCERNING CONFLICTS OF INTEREST

This memorandum is submitted in support of the Government's motion to resolve an apparent conflict of interest in the representation of the defendants Alphonse Sisca, Willie Abraham, Erroll Holder, Walter Grant, Robert Hoke, and Margaret Logan, by the firm of Lenefsky, Gallina, Mass, Berne and Hoffman.

I. STATEMENT OF FACTS

A single firm represents six of the defendants in this narcotics case. Moreover, a critical reading and appraisal of the indictment further discloses that at least three successive stages or "links" are involved. For example, the alleged December 13, 1971, Sisca-Abraham meeting (Overt Act No. 13) is closely followed by the December 15, 1971, 8.5 kilogram possession of Abraham, Grant, Logan and Hoke (Overt Act No. 18). When those events are back-lighted by the allegation that Abraham was the leader of an unlawful narcotics enterprise involving five or more persons (Count Two), it would seem clear that the six jointly represented defendants form at least three successive links in the distribution chain and perhaps more. Such varying roles give rise to interests which differ so significantly that multiple representation is, as hereinafter pointed out, inadvisable to say the least.

There is no basis for inferring the existence of any informed or intelligent waiver by any of the six defendants.

II. ARGUMENT

The Representation of Multiple Defendants At Successive Stages In A Narcotics Distribution Chain, Without Any Waivers, Involves A Conflict of Interest As A Matter Of Law.

It would seem self-evident, that the relatively more severe penalties in narcotics cases would tend to enhance the ever present intra-intimidation between co-conspirators to maintain the silent integrity of the conspiracy. And, all too frequently, violent means are employed by the leaders at the top of the narcotics distribution chain. (See, for example, United States v. Cirillo, Slip. Op. pp. 350-351 (2d Cir. Nov. 6, 1972) (co-conspirator's failure to disclose leader's role resulted from fear of being murdered by him). Doubtlessly as a result, at least in part, of this reality, the general canon on this

MacD:sr

point has recently been redrafted in respect of the multiple representation of defendants in criminal cases. In relevant part, it is there stated that:

> "The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation. (§3.5(b), Standards Relating To The Defense Function, A.B.A. Project On Standards For Criminal Justice (1971)) (Emphasis added).

Moreover, the Supreme Court has long recognized that conflicting interests may well give rise to a meritorius claim of ineffective assistance of counsel. In Glasser v. United States, 315 U.S. 60 (1942), the Court stated:

> "[i]rrespective of any conflict of interest the additional burden of representing another party may conceivable impair counsel's effectiveness... The right to have the assistance of counsel is too fundamental and too absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." (Id. at 75-76).

The Government respectfully submits that there is every reason to believe that the interests of the six defendants are sufficiently varying as to require a finding that a conflict of interest is present in their joint representation. They played significantly different roles with varying levels of responsibility and culpability in this "chain." The proper representation of each ought to include recommendations and judgments based on an individual analysis unencumbered by any diverse considerations and interests.

As to waiver, the Government submits that such cannot be knowing and intelligent if based on the advice of the attorney held to be representing conflicting interests. The inadequacy of such advice has been recognized by the A.B.A. Criminal Justice Project. In the comment to the previously quoted standard, it was stated that:

> "there are situations in which the lawyer's independent representation of his client is so inhibited by conflicting interests that even full disclosure and consent of the client may not be an adequate portection" (Comments to §3.5(b), pp. 213, A.B.A. Standards, supra).

Here, there probably not being full disclosure by any of the lesser clients in the first instances, it cannot be doubted that such uninformed consent is not adequate protection. It would seem that the only way that a valid waiver could be forthcoming is for independent counsel, perhaps in the nature of appointed amicus curae*, to advise each of the six defendants concerning their respective waiver decisions.

III Conclusion

For the reasons stated, it is respectfully requested that the motion be granted.

Respectfully submitted,

WHITNEY NORTH SEYMOUR, JR.
United States Attorney for the
Southern District of New York
Attorney for the United States
of America

W. CULLEN MacDONALD,
Assistant United States Attorney,
Of Counsel.

---

* Judge Motley recently appointed Murray Mogel, Esq. in such a capacity in United States v. Christopher Warren (S.D.N.Y.).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
v.	:	SUPPORTING AFFIDAVIT
ALPHONSE SISCA, et al.,	:	72 Cr. 1159
Defendants.	:	

STATE OF NEW YORK)
COUNTY OF NEW YORK :ss.:
SOUTHERN DISTRICT OF NEW YORK)

W. Cullen MacDonald, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, and, as such, I am in Charge of the above-captioned matter. This affidavit is submitted in support of the Government's motion to resolve the representation of the conflicting interests of six of the defendants herein, Sisca, Abraham, Holder, Grant, Hoke and Logan, by the same firm of attorneys, Lenefsky, Gallina, Mass, Berne and Hoffman.

Prior Proceedings

2. On October 16, 1972, Indictment 72 Cr. 1159, in three counts, was filed charging all named defendants with conspiring to violate Sections 812, 841(a)(1), and 841 (b)(1)(A) of Title 21, United States Code, and with using a communication facility during the commission of said conspiracy in violation of Section 843(b), Title 21, United States Code. Additionally, count two further charges

the defendant, Willie Abraham a/k/a/ J.C., with engaging in a continuing criminal enterprise in violation of Section 848, Title 21, United States Code.

3. On October 30, 1972, all but four of the defendants appeared and pled not guilty to Indictment 72 Cr. 1159, before the Honorable Edward Weinfeld, United States District Judge. At that time, the case was assigned to the Honorable Frederick vP. Bryan, United States District Judge, for all purposes.

4. At the same time on October 30, 1972, Mr. Jeffrey M. Hoffman of the firm of Lenefsky, Gallina, Mass, Berne and Hoffman filed notices of appearance on behalf of the defendants Sisca, Abraham, Holder, Grant, Hoke and Logan. In response thereto, the following occurred:

By Judge Weinfeld:

> "Q. Mr. Hoffman, I take it that you have discussed whether or not there is any conflict of interest in your firm's representation of a number of defendants here?"

By Jeffrey M. Hoffman:

> "A. That's correct your Honor. At the present time, having spoken to them, in the posture they are in at the present time, I find no conflict of interest."

5. Also on October 30, 1972, Lawrence Greenberg, an attorney employed by the Legal Aid Society was appointed to represent the defendant Laverne McBride. Previously, Murray Addie, also an attorney with the Legal Aid Society, had been appointed to represent the defendant, Leonard Ellington. Thereafter, new counsel were substituted for Ellington but, because of a felt conflict of interest arising from the

mutual representation of both of said defendants, albeit briefly, the Legal Aid Society requested that other counsel be appointed for McBride. Thus, on November 9, 1972, Gilbert Epstein, Esq., was substituted as appointed counsel for McBride.

The Current Proceeding

6. The Government's case against each of the six defendants now jointly represented will disclose, in general, the "chain" conspiracy typified in narcotics cases (e.g., United States v. Bruno, 105 F.2d 921 (2d Cir.), rev'd on other grounds, 308 U.S. 287 (1939): United States v. Stromberg, 268 F. 2d 256 (2d Cir.), cert. denied, 361 U.S. 863 (1950); United States v. Agucci, 310 F.2d 817 (2d Cir. 1962), cert. denied, 372 U.S. 959 (1963). As such, the various joint meetings of the six defendant-conspirators with their respective contacts in the chain are incidents as to which variant proof might well result in varying verdicts. For example, if any one participant at such meetings were to testify, a failure of cross-examination concerning other mutually represented participants would necessarily result. Thus, one or more of the latter could be deprived of a cross-examination for the purpose of minimizing participation into "mere association," etc., (Morgan v. United States, 396 F.2d 110 (2d Cir. 1967). Moreover, even if all six were to refrain from testifying, the Government's case, of necessity, could still vary between defendants with respect to those matters typically contested, e.g., physical and/or voice identifications, degree of

apparant dominance or subservience as creating a reasonable doubt, possibility of an innocent interpretation of otherwise ambiguous conversations between these defendants as creating a reasonable doubt, etc.

7. In advance of trial, each of these six defendants will decide whether or not to forego trial by pleading guilty to all or part of the indictment. Since the maximum possible punishment under the three counts of the indictment varies so considerably, from a low of four years incarceration on count three, to fifteen years on count one, and to life imprisonment on count two, that decision ought to be free of any possible imperfections of advice resulting from conflicting loyalties.

8. To the extent that a "waiver" claim of justification may be asserted, it would appear that, absent independent counsel concerning that decision, a knowing and intelligent waiver finding is not possible. Indeed, the very fact of the same counsel's representation of successive links in a chain narcotics conspiracy could well inhibit the kind of frank disclosure necessarily a predicate to any informed legal judgment.

WHEREFORE, for the reasons stated in the Government's Memorandum, it is respectfully requested that the Government's motion be granted.

S/W Cullen MacDonald
W. CULLEN MacDONALD
Assistant United States
Attorney

Sworn to before me this
16th day of November, 1972.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILLIE ABRAHAM, Petitioner -v- UNITED STATES OF AMERICA Respondent	76 Civ. 978
ERROLL HOLDER, Petitioner -v- UNITED STATES OF AMERICA Respondent	76 Civ. 1424

NOTICE OF HEARING

Petitioners Willie Abraham and Errol Holder move pursuant to 28 U.S.C. §2255 for an order vacating their Judgments of Sentence and granting a new trial on the ground that they were denied effective assistance of counsel.

Pursuant to 28 U.S.C. §2255, an evidentiary hearing will be held on Tuesday, May 25, 1976 at 9:30 a.m. in Courtroom 519, United States Courthouse, for the limited purpose of taking evidence on the issue of whether the petitioners gave an informed consent to being represented at trial by the law firm of Lenefsky, Gallina, Mass, Berne and Hoffman. The United States Attorney will make appropriate arrangements so that petitioners may testify at the hearing.

It is so ordered.

Dated: New York, N.Y.
April 15, 1976

U. S. D. J.

CIVIL SUBPOENA

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

TO Hon. Robert B. Fiske, Jr.
United States Attorney
for the Southern District
of New York or his
authorized representative

CASE NO. 76 CIV. 978

JUDGE'S INITIALS DBB

YOU ARE HEREBY COMMANDED to appear in the United States District Court for the Southern District of New York, at the courthouse, Foley Square in the City of New York, in said District, on the 25 day of May A.D. 19 76, at 8:30, o'clock A M. of said day (and bring with you all records, notes and transcripts and memoranda concerning

1. The naming of Gino Gallina, Esq. as an unindicted co-conspirator in the case of U. S. v. Magnano et al, 75 CR 687 (SDNY) whereby Mr. Gallina allegedly attempted to collect $200,000 in narcotics monies from FRank Lucas for one Ernie Malizia; the latter being two substantial narcotics dealers.

2. The allegation by AUSA Dominic F. Amorosa in his affidavit filed in the case of U.S. v. Magnano, supra, 1/26/76 that a witness had told the Federal Prosecutor that Zack Robinson - - - a narcotic dealer represented by Mr. Gallina - - - stated that Robinson

(see attached Rider)

then and there to testify on behalf of the Petitioner

in a suit pending in said Court wherein Willie Abraham is Petitioner

and United States of America is respondent

April 30, 19 76.

RAYMOND F. BURGHARDT, *Clerk.*

By
M. C. BERRAN, *Deputy Clerk.*

Alan M. Palmer, Esq.
Attorney for

1707 N. Street N.W.
Address Washington, D.C.

FPI M1—9 24 75 2M 4416

had used his lawyer, Mr. Gallina and his investigators to obtain information necessary to carry out murders against adverse witnesses; also provide us with the name and address of this witness and the names of the two other witnesses against Mr. Robinson who had been murdered in addition to Marjorie Morris.

3. Attempts by Federal Authorities to enlist the cooperation of Willie Abraham between 12/15/71 and the commencement of his trial herein - - - - - naming dates, times, places and personnel.

4. All information including intercepts from whatever source derived to the effect that Mr. Gallina received a cash fee in 72 CR 1159 of approximately $300,000.

5. All other information helpful to the defense in its cross examination of Mr. Gallina in this case.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

WILLIE ABRAHAM,

Petitioner,

v. 76 Civ. 978

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM AND PROPOSED FINDINGS OF FACT

I.

The hearing of May 25, 1976, conclusively establishes that Gino Gallina, Esq. is not what one would characterize as a truth telling person.

A. As the Court will recall, the main thrust of our Motion was that because of a conflict of interest, Mr. Gallina purposely delayed filing the minimization motion until the start of the trial as a deliberate ploy conceived to aid the Sisca defense. This argument was grounded in the theory that the evidence available against Mr. Sisca was relatively weak. (Mot. at 10) A theory buttressed by the judgment of an actual participant in the trial, i.e., Mr. John Pollack.

> "Q. As you evaluated the cases, sir, did you consider [the] case against Mr. Sisca a weak one?
>
> A. Yes." (Tr. 25 May 99-100)

At the hearing before this Court on May 25, 1976, Mr. Gallina denied being directed by the trial court to file a minimization motion pre-trial and failing to do so.

> "A. We had not been so directed." (Tr. 25 May 129, 130)

For guidance as to Mr. Gallina's credibility on this score, we need to look no further than the extant evaluation of three federal appellate judges from this Circuit.

In this very case on appeal, United States v. Sisca, 503 F.2d 1337 (2d Cir. 1974), the Court discussed the strategy of trial counsel after the chamber's conference with Judge Bryan, i.e., the strategy of Gino Gallina, Esq.

"Appellants" said the Court "deliberately failed to raise the claim of failure to minimize in a pretrial motion although specifically directed to do so." at 1346. The Court condemned the late filing as "deliberate and subtly disruptive tactics...." 1349.

The absolute correctness of this appellate evaluation of Mr. Gallina's conduct and hence present credibility, is further revealed by the testimony of John L. Pollock, Esq. At the instant hearing Mr. Pollack testified that as an associate in Mr. Gallina's firm, he had drafted a minimization motion pretrial and had given it to Mr. Gallina before the trial commenced. (Tr. 25 May 91) Mr. Pollock assumed that the motion had been filed pretrial and when he raised the minimization issue at trial, he was surprised to learn that Mr. Gallina had not filed the motion previously. (Tr. 25 May 92).

This revelation was devastating to Mr. Gallina's credibility as a witness in two ways:

1. It conclusively showed that he deliberately held back the minimization motion and then lied about it at this hearing.

2. We were left with whether to believe Mr. Gallina or Mr. Pollock, because the former positively stated that Mr. Pollock never gave him a minimization motion for filing prior to the start of the trial. (Tr. 25 May 128-129). An incredible assertion, we submit.

B. At the conflict of interest hearing of November 22, 1972, Mr. Gallina went on at great length to Judge Bryan about how he greatly suspected the government's motives in filing its conflict of interest motion. Specifically he believed that the government was seeking to break up the joint representation so that one or more of the defendants might become an informer.

> "In other words seek cooperation from the government and get rid of your attorney or your attorney is not out for your interest. (Conflict tr. 14)
>
> * * * *
>
> "The Government wants to divide the defendants. It is a very weak case with very little evidence against certain defendants [SISCA] and they feel that if they can divide the defendants they may be able to perfect their case through cooperation from certain defendants." (Conflict Tr. 16)

To corroborate this assertion Mr. Gallina went on at great length about how Mr. Abraham had been picked up by the federal authorities the morning after he was released on bail from the state arrest in the Bronx. He continually called the federal prosecutor Mr. John Walker, who denied knowing where Mr. Abraham was. Disbelieving this, Mr. Gallina and his associates went to Mr. walker's office with two associates around 7 p.m. that day and

"there was Mr. Abraham and Mr. Walker and 15 agents from the Task Force. He had been there all day." (Conflict Tr. 21)[1/]

* * * *

"One refrain that was continually pointed at Mr. Abraham's head--they had months and months of visiting in the Bronx House of Detention and while he was at West Street--'we will get you an attorney; we will get you an attorney.'"

* * * *

"I suspect the Government's attorney in making the application here to your Honor today.... I do suspect the Government's motives. I think the Government's motives are based on the fact that they have a very weak case. They feel the only way to win it is to divide the defendants. (Conflict Tr. 22.)

In perfect harmony with these assertions by Mr. Gallina--when the latter still had some semblance of a memory--Mr. Abraham testified at the hearing that Government agents continually sought his cooperation and advised him to leave the Gallina firm. (Tr. 25 May 10-14.)

Of course Mr. Abraham also stated that one of the reasons the Government wanted a change in lawyers was because it feared that Mr. Gallina had some involvement or "something to do with the people that they were questioning me about." (Tr. 25 May 14) One of these people was Alphonse Sisca (Tr. 25 May 12), the very person we alleged that Mr. Gallina was trying to protect herein. The government conceded the correctness of this testimony. (Tr. 25 May 174-175)

1/ The description of this event at the instant hearing by Mr. Gallina was rather vague and omitted this vivid outline. Tr. 25 May 117-118.)

He further testified that he was arrested in the instant case in October of 1972.[2/] He was not released on bail until November 21, 1972, the day prior to the conflict of interest hearing before Judge Bryan. (Tr. 25 May 20) The conflict of interest hearing itself corroborates this because in it Assistant U. S. Attorney W. Cullen MacDonald asserted...

> "a second matter and that is Mr. Abraham's bail status. It has just come to my attention this morning that late yesterday he was admitted to bail by the United States Magistrate...."(Conflict Tr. 4, November 22, 1972.)

Therefore, during the period between the indictment and the conflict of interest hearing, Mr. Abraham was in jail, and accordingly the only possible time he could have met with Mr. Gallina in the latter's office to discuss the matter with the other defendants was the morning of November 22, 1972. (Tr. 25 May 25-26). Thus Mr. Gallina's assertions that he had numerous conferences with Willie Abraham, his girlfriend and other defendants in the case prior to November 22, 1972, was not possible of occurring. See Tr. 25 May 107-112, 134-137, 157-159).

In any event, Mr. Abraham further testified that at the morning meeting of November 22, 1972, all of the defendants were present except Mr. Sisca.

At that time Mr. Gallina advised them that

> "[T]he government had filed a motion to split us up from the firm and that the government felt that if they could split us up they might have a chance of getting someone to inform. Therefore, they would make the government case much stronger and that he wouldn't know what the other one was doing." (Tr. 25 May 26.)

2/ The indictment was filed on October 16, 1972.

Although this was exactly what Mr. Gallina told Judge Bryan on November 22, 1972 at 10:45 A.M., he denied telling this to the defendants not more than an hour before.

> "You told that to Judge Bryan, didn't you?
>
> A. Yes.
>
> Q. Didn't you tell the same thing to the defendant?
>
> A. No...." Tr. 25 May 141. On this record, that answer is incredible.

After so advising the defendants, Mr. Abraham testified that Mr. Gallina

> "suggested...that no matter what happened or what takes place or what questions, the answer was to stay with the firm, and any answer that would keep us with the firm, those were the answers we were supposed to give." (Tr. 25 May 26.)

C. Mr. Abraham also testified that he authorized Mr. Gallina to go into his safe deposit box and remove $270,000 in cash which the latter did. (Tr. 25 May 8-9, 17) Of this sum $125,000 was expended for bail money and legal fees and Mr. Gallina was supposed to return $145,000 to Mr. Abraham. (Tr. 25 May 18-19) When questioned about these funds, we were treated to Mr. Gallina invoking his 5th Amendment privilege against self-incrimination three times. (Tr. 25 May 116, 126, 181)

In light of the history of man in general and Mr. Gallina in particular, is it possible to accept his testimony that he was not at all concerned with and indeed, the thought never entered his mind, that if the clients left because of a conflict he would have to return part of the fee to them. (Tr. 25 May 150-151) A sum possibly in the range at that time of

$180,000. (The $145,000 he owed Abraham and another $25,000 to $30,000 of the $50,000 fee.) We think not!

Accordingly, we ask the Court to find as a fact that Petitioner Willie Abraham did not on November 22, 1972, give an informed consent to being represented at trial by the law firm of Lenefsky, Gallina, Mass, Berne and Hoffman.

II.

In addition to our argument that on the face of it, the attempted waiver did not shoulder its burden, United States v. Garcia, 517 F.2d 272 (5th Cir. 1975); United States v. Armedo-Sarmiento, 524 F.2d 591 (2d Cir. 1975), the testimony of John L. Pollock, Esq. has raised another consideration in this case.

At the hearing Mr. Pollock testified that he was not aware of the hearing of November 22, 1972, and that several days before the trial he had a meeting in his office because he was concerned, in part, about a then existing conflict of interest. It is also clear that Mr. Abraham was not present at that aspect of the meeting because he came late. (Tr. 25 May 78, 93, 71, 189-190.)

Mr. Pollock at this meeting which would have occurred several days prior to the commencement of the trial on January 16, 1973, brought forward the conflict issue

> "because I felt very strongly at that time there was in fact a conflict of interest.
>
> * * * *
>
> And it was my opinion that there were particularly strong conflicts of interest between Mr. Abraham and Mr. Hoke, his brother in law.... And I also felt it was wrong for the law firm to represent six defendants." (Tr. 25 May 79-80)

Thus, the validity of the waivers on November 22, 1972, aside, these later appearing conflicts which prejudiced Mr. Abraham in particular, clearly indicate that a new trial is warranted. It was incumbent on counsel to bring these matters to the attention of the trial court for resolution some two months after the initial hearing. Of course Mr. Pollock was somewhat blameless in this regard, because Mr. Gallina never even told him about the first waiver hearing. United States v. Vowteras, 500 F.2d 1210 (2d Cir. 1974) indicates that these later arising prejudicial conflicts do have an impact upon the validity of the trial notwithstanding a prior waiver. For although a waiver may occur a defendant may not repudiate his choice "in the absence of a credible showing of some specific instance of prejudice, some real conflict of interest, resulting from a joint representation." 500 F.2d at 1211. Cf. esp. United States v. Liddy, 348 F.Supp. 198 (D.D.C. 1972) (Sirica J. held that if matters changed, the Court kept open the possibility of reconsidering its waiver ruling at a later time.)

Judge Bryan cannot be faulted herein, because he had no way of knowing what was occurring in the defense camp and the type of tactics Mr. Gallina was indulging in.

CONCLUSION

Wherefore, for the reasons advanced we urge the Court to bacate petitioner's sentence pursuant to 28 U.S.C. § 2255 and grant him a new trial.

Respectfully submitted,

Allan M. Palmer
1707 N Street, N.W.
Washington, D. C. 20036
202-785-3900

Morton Katz
15 Park Row
New York, New York 10036

CERTIFICATE OF SERVICE

I hereby certify that I have mailed, postage prepaid, a copy of the foregoing to the following persons this ___ day of June 1976.

1. Office of the Clerk
   United States District Court
   Southern District of New York
   Foley Square
   New York, N. Y. 10007

2. W. Cullen MacDonald, Esq.
   Assistant U. S. Attorney
   One St. Andrews Plaza
   New York, N. Y. 10007

Allan M. Palmer

KW
M-1817

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

WILLIE ABRAHAM and
ERROL HOLDER,

Petitioners,

- v -

UNITED STATES OF AMERICA,

Respondent.

76 Civ. 978
76 Civ. 1424

- x

GOVERNMENT'S MEMORANDUM OF LAW IN OPPOSITION TO PETITIONER'S MOTIONS TO VACATE THEIR SENTENCES

STATEMENT OF FACTS

On October 16, 1972 Indictment 72 Cr. 1159 was filed charging Willie Abraham and Erroll Holder, among others, with violations of the federal narcotics laws. Six of the defendants, including the petitioners, were represented by the law firm of Lenefsky, Gallina, Mass Berne and Hoffman. On November 22, 1972, in response to a motion by the Government, the Honorable Frederick vanPelt Bryan conducted a hearing to determine that each defendant was knowingly and voluntarily proceeding to trial with joint counsel rather than individual counsel. After the hearing in which each defendant was individually questioned by Judge Bryan, Judge Bryan decided that each defendant had

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waived his right to separate representation.

The defendants were convicted at trial and their convictions were affirmed. Petitioners Abraham and Holder have filed petitions pursuant to 28 United States Code, Section 2255 claiming that a conflict of interest by their counsel resulted in the ineffective representation of petitioners. Specifically, petitioners claim that the hearing conducted by Judge Bryan on November 22, 1972 was inadequate. This Court conducted an evidentiary hearing on May 25, 1976.*

LEGAL DISCUSSION

In Glaser v. United States, 315 U.S. 60 (1942) the Supreme Court included the right to representation free from conflicting interests within the basic sixth amendment right to the assistance of counsel in criminal cases.

Because of the potential hazards of joint representation, the Second Circuit has held that where the trial court becomes aware of a potential conflict of interest it must "conduct a hearing to determine whether

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* "Tr." will refer to transcript references from the November 22, 1972 hearing, and "Tr. Hearing" will refer to transcript references from the May 25, 1976 hearing.

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there exists a conflict of interest with regard to defendants' counsel such that the defendant will be prevented from receiving advise and assistance sufficient to afford him the quality of representation guaranteed by the Sixth Amendment. The trial judge must see that the defendant is fully advised of the facts underlying the potential conflict and is given an opportunity to express his or her views." United States v. Alberti, 470 F.2d 878, 881-882 (2d Cir. 1972), cert. denied, 411 U.S. 919.

No single procedure is required, but the court has consistently stressed the need to advise and question each defendant individually regarding the possibility of a conflict of interest. This procedure was first approved in United States v. DeBerry, 487 F.2d 448 (2d Cir. 1973) and was recently reaffirmed in United States v. Mari, 526 F.2d 117 (2d Cir. 1975).

The inquiry conducted by Judge Bryan clearly met the Second Circuit standards. Indeed, by individually questioning each defendant on four separate occasions during the hearing, Judge Bryan made absolutely certain that each defendant understood that a conflict of interest might exist, that each could select individual counsel, and that if they selected joint representation they could not return at a later date to contend that they had been deprived of

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their right to individual representation.

The adequacy of the hearing conducted by Judge Bryan is evident. In open court with all six defendants present Judge Bryan instructed each to pay close attention to the proceedings "because it may vitally affect their interests in this case" (Tr. 3). To encourage candid communication between the defendants and Judge Bryan, Mr. Gallina offered to absent himself from the proceedings (Tr. 13). The Court believed this was unnecessary and began to speak to each defendant individually (Tr. 22). At this point he explained to each defendant the serious charges brought against him, the possibility, in fact the probability of a conflict of interest, and the right of each defendant to be represented by individual counsel. Judge Bryan explicitly told Willie Abraham that "there is the possibility of a situation developing during this trial in which the best protection of your interests may be different from the protection of the interests of one or more of your co-defendants who is represented by the same counsel." He told Abraham about the "possibility of conflict of interest" and his right to keep the Gallina law firm or find new counsel (Tr. 24-26). Similar questions were asked of Erroll Holder (Tr. 26-28). Neither Abraham nor Holder indicated in any way that he was not knowingly

and voluntarily waiving his right to be represented by individual counsel.

Judge Bryan later in the hearing asked each defendant separately if "any threats or pressures had been put on you to stay with Mr. Gallina's firm." Both Abraham and Holder responded "no". (Tr. 31). Again Judge Bryan addressed each defendant separately to inquire whether each had a clear mind free from drugs or ill health. Both Abraham and Holder responded that their minds were clear (Tr. 33-34).

Finally, Judge Bryan, in order to be certain that each defendant fully understood the consequences of his action, and to prevent a defendant returning at a later time to complain that he should not have been represented by the same law firm which represented his co-defendants, stated:

> THE COURT: I am going to say this to each of the defendants; I want you to understand that by taking the position that you do this morning, that you want to continue with the Gallina firm representing all six of you, despite what we talked about here earlier, that you are doing this for good. You are committing yourselves now and you are never going to be able to raise this question on appeal or any other time if something develops during the trial that is unfavorable to you. You have elected to keep the Gallina firm; do you understand that?

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(Defendants answered in the affirmative.)

THE COURT: Do you understand that when the trial is over I am not going to have people coming back to me then and saying: "I didn't like my counsel. I didn't like the way he represented me. I didn't like the way he represented me either."

You've got to fish or cut bait for good, you understand.

(Defendants answered in the affirmative.)

THE COURT: I think you all understand, but I will ask each of you.

Judge Bryan then asked Abraham "do you want to continue with the Gallina firm", and he responded "Yes, Your Honor" (Tr. 37). The same question was asked of Holder and he too responded affirmatively.

Indeed, Judge Bryan aptly summarized the situation he confronted when he stated after speaking with each defendant five times separately:

> . . . so that what I am going to do is to resolve the question before me this morning upon the basis that each of these defendants has freely exercised his or her choice of counsel and with full realization of the possibilities or, indeed, the probabilities that some conflict of interest may develop, they have elected to continue to have Mr. Gallina's firm represent them. The only thing I can do with such a free election is to recognize their right to make such a free choice and I will permit them to do so. (Tr. 43)

Hearings similar to the one conducted by Judge Bryan have been upheld by the Second Circuit in United States v. Wisniewski, 478 F.2d 274 (2d Cir. 1973), and most recently in United States v. Mari, 526 F.2d 117 (2d Cir. 1975). In Mari the trial judge pointed out the possibility of a conflict of interest because of the joint representation, and asked both defendants and their attorney if each understood the possibility of a conflict. All three replied in the affirmative.

After conviction the defendant instituted an action to vacate his conviction pursuant to 28 U.S.C. § 2255, on the ground that he was denied effective assistance of counsel because it was improper for both defendants to have been represented by the same attorney. At a hearing the defendant claimed that his attorney had not discussed a possible conflict of interest. This was contradicted by the attorney.*

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* At the evidentiary hearing conducted by this Court Mr. Gallina testified that although he could not remember specific dates, he and other members of his law firm met with all the defendants on a number of occasions about the conflict issue. Tr. Hearing 107, 135. Between the time the government filed its motion and the November 22 hearing all of the defendants were told both the advantages and disadvantages of joint representation. Tr. Hearing at 112. These discussions were interwoven in discussion and preparation of the case. Tr. Hearing 11, 158.
Gallina also denied giving the defendants instructions on how to answer Judge Bryan's questions. Gallina also testified that some of the defendants, including Sisca and

FOOTNOTE CONTINUED ON NEXT PAGE

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FOOTNOTE CONTINUED

Abraham, told him that they had discussed the conflict issue with attorneys outside the Gallina firm. Tr. Hearing at 164.

Pollock testified that he discussed the subject of joint representation and conflict of interest with defendant Holder two or three days prior to trial in a joint meeting with a number of defendants. Tr. Hearing 77-78. Pollock stated that he felt strongly that there was in fact a conflict of interest. Tr. Hearing77-79 and that he explained this to all the defendants at the meeting, and asked them if they understood. According to Pollock, the defendants indicated that they understood and that they wished to continue. Tr. Hearing at 80.

The court held that "DeBerry only requires that the trial judge conduct a careful inquiry, including a personal interrogation of the defendants, to satisfy himself that no conflict exists and that the parties had no valid objection to joint representation." United States v. Mari, supra, 526 F.2d at 119. See also United States v. Sheiner, 410 F.2d 337 (2d Cir. 1969), cert. denied, 396 U.S. 825.

In United States v. Wisniewski, the court found a waiver of conflict-free representation where the judge had questioned the defendants in a manner similar to the hearing in this case. The court upheld the conviction where the attorney informed the court in the defendants' presence that on several occasions he had informed the defendants of a possible conflict of interest and that they had a right to counsel of their choosing whether privately retained or court-appointed. The trial judge then individually asked the defendants whether they understood what the defense attorney had said and whether they still wanted him as their attorney. Each defendant individually answered in the affirmative. The court rejected the claim of ineffective assistance, despite prejudice suffered by one of the defendants since "both the existence and the significance of any possible conflict of interest

between himself and the other defendants, had one existed, should have been apparent to him, especially after his attention was repeatedly drawn to the possibility of conflict." Wisniewski, supra, 478 F.2d at 283-284.*

Moreover, in Wisniewski, the Second Circuit found a waiver of the right to conflict-free representation where the defendant suffered actual prejudice. The prejudice suffered by these petitioners because of joint representation is difficult if not impossible to discern. They claim to have suffered prejudice due to the failure to file a timely minimization motion. They argue that this showed that the law firm was more concerned with protecting Sisca's interests than their own interest. We simply fail to comprehend how Sisca was any less prejudiced than Abraham or

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* Defendant Abraham concedes that in Wisniewski a waiver of the right to conflict-free representation was effected in a fashion similar to the one at bar, but attempts to distinguish Wisnkewski on the grounds that in the instant case there was "no effort to determine if the petitioner understood how a conflict might arise" (Motion to Vacate Sentence, at 17). In fact, the inquiries conducted in Wisniewski were even less specific than those in the hearing before Judge Bryan. Judge Bryan directly advised the defendants or called their attention to statements made by others regarding such opportunities for conflict of interest as where it might be more advantageous for some defendants to take the stand than others, Tr. at 41; and where common counsel might be reluctant to call attention to the weakness of proof against a particular defendant, e.g., Tr. at 10, 23-24 (See generally Tr. pp. 23, 25, 27, 29, 30). All of the defendants heard Mr. McDonald state that the strength of the government's case varied among the defendants Tr. at 10 and Judge Bryan called attention to his comments when he began questioning the defendants individually. Tr. at 24.

Holder by the failure to file the minimization motion prior to trial. It appears that the lawyers may have made a strategic decision to file the motion at a time when the Government could not appeal from an adverse ruling. All defendants including Abraham, Holder, and Sisca would have benefited from such a decision; all equally suffered when that strategic judgment to file tardy papers backfired.

In addition, there is the claim that Gallina spent an inordinate amount of time working on Sisca's case to the detriment of petitioners. This argument fails to recognize that other lawyers in Gallina's firm represented Abraham and Holder, and not Sisca. Thus, they could have spent time preparing Abraham and Holder's defense. Moreover, this claim of prejudice is too speculative and remote to support a claim of ineffective assistance of counsel.

Abraham contends that the hearing before Judge Bryan was inadequate because (1) individual counsel were not appointed for the joint representation hearing, pursuant to the suggestion of Assistant United States Attorney MacDonald, and (2) the decision in United States v. Armedo Sarmiento, 524 F.2d 591 (2d Cir. 1975) requires that a Rule 11 procedure must be employed at a joint-representation hearing. There is an absolute dearth of authority for the first argument. Certainly, if a defendant may waive his

right to the assistance of counsel without consulting an attorney, he may waive his right to separate counsel. See Faretta v. California, 422 U.S. 806 (1975); Adams v. United States ex rel. McCann, 371 U.S. 269 (1942).

Defendant's argument on the second point completely misconstrues Armedo-Sarmiento. Abraham argues that by citing the Fifth Circuit decision in United States v. Garcia, 517 F.2d 272 (1975), the court in Armedo-Sarmiento adopted the Rule 11 type inquiry set forth in Garcia. The Armedo court, however, approved only the "reasoning" of the Garcia opinion which supported its holding that the right to effective assistance of counsel can be waived. Secondly, the Garcia opinion itself, concedes that "mere assent to a series of questions from the bench may in some circumstances constitute an adequate waiver" United States v. Garcia, supra at 278. Finally, in United States v. Mari, supra, decided after Armedo, the Second Circuit specifically reaffirmed the adequacy of the DeBerry-type procedure followed in the instant case. The essential holding in Armedo is that a defendant may waive his right to conflict-free representation. It is therefore not the defendant's position, but the government's position, that "now appears inexorable in light of United States v. Armedo-Sarmiento" (Defendant Abraham's Supplemental Memorandum at p. 2).

In light of the strong policy permitting a defendant to be represented by counsel of his choice, see Farette v. California, 422 U.S. 806 (1975); U.S. ex rel Davis v. McMann, 386 F.2d 611 (2d Cir. 1967), cert. denied, 390 U.S. 958 (1968), it is difficult to imagine what else Judge Bryan could have done other than to permit Abraham and Holder to be represented by the same law firm as their codefendants. A defendant may insist upon joint counsel or counsel of his own selection even where the conflict of interest is apparent and not at all speculative or remote. The facts and decision in United States v. Armedo-Sarmiento, 524 F.2d 591 (2d Cir. 1975) are particularly instructive on this point. In Armedo-Sarmiento the trial judge had disqualified counsel for two defendants because that law firm had previously represented three individuals whom the Government planned to use as witnesses. The witnesses were unwilling to waive the attorney-client privilege regarding communications with their previous lawyers who now represented the two defendants. Thus the lawyers were disqualified because they could not effectively cross examine the potential Government witnesses, for fear of violating the attorney client privilege.

The Second Circuit reversed the trial court's disqualification order because the district court did not give sufficient weight to the defendant's rights. The Court explicitly recognized that the defense counsel's conflict of interest may impair his ability to effectively assist his client in cross examining the Government witnesses who had been represented by the same lawyers who now represented the defendants. However, the defendants must be given the opportunity to elect to proceed with these lawyers "and to thereby make a knowing and intelligent waiver of any claims which might arise from their attorneys' conflict of interests." Armedo-Sarmiento, supra, 524 F.2d at 593.

If a defendant's right to proceed with counsel of his own choice is so compelling and paramount that he can do so despite the inability of that lawyer to effectively cross-examine important Government witnesses, then Abraham and Holder could properly waive their rights when the difficulties presented by the conflict were more speculative. To permit -- indeed to compel -- trial courts to allow defendants to insist upon joint representation and then to allow them to return to court at a later date when their joint representation strategy fails, is to place trial judges in an absolutely untenable position.

RW:sr
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Judge Mansfield aptly stated the problem in United States v. Wisniewski, supra, 478 F.2d at 285:

> To permit a post hoc judicial inquiry into earlier privileged attorney-client communications whenever a defendant seeks to set aside his conviction on grounds of conflict of interest on the part of his lawyer would be virtually to outlaw joint representation, since the temptation to attack his counsel's unsuccessful strategy would be too great for the disappointed client to resist, particularly when he stood to lose nothing by launching the attack.

A trial judge can do no more than satisfy himself in open court that a defendant is aware of the conflict of interest possibility and is knowingly waiving his right to separate counsel. To characterize Judge Bryan's hearing as a "charade" as petitioners have done is to cast in doubt the validity of numerous hearings trial judges regularly conduct to insure that a defendant has knowingly waived a constitutional right. Granting the writ of habeas corpus in the instant case would invite all defendants who make the strategic choice to participate in a joint and coordinated defense to attack collaterally that decision when the strategem fails and the defendant is convicted. Abraham and Holder selected the strategy of a joint defense with all the advantages and disadvantages attendant to that decision. The dangers of that decision were adequately explained to them, and,

thus, they cannot now complain because they believe they chose unwisely.

CONCLUSION

For all of the foregoing reasons, the Court should deny petitioners' motions to vacate their sentences and to order a new trial.

Respectfully submitted,

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for the United States
of America

RICHARD WEINBERG,
Assistant United States Attorney,
-Of Counsel-

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILLIE ABRAHAM,	:	
Petitioner,	:	
v.	:	76 Civ. 978
UNITED STATES OF AMERICA,	:	
Respondent	:	

REPLY TO GOVERNMENT'S MEMORANDUM
OF LAW IN OPPOSITION TO PETITIONERS'
MOTIONS TO VACATE THEIR SENTENCES

With understandable reluctance, the government has declined to pick up the gauntlet raised by our four-square attack upon Mr. Gallina's credibility. We suggest that the government's sweep-it-under-the-rug approach evidenced by its footnote at pages 7 and 8 of its opposition, simply will not do to ward off the compelling facts produced by the defense herein.

Judge Bonsal afforded the government seven days to respond to our findings of fact. In our judgment, the government did not respond thereto, but rather chose to duck our pleading and accordingly, gives little or no guidance to this Court on its view of the facts. The government's pleading might very well have been written without there ever having been a hearing on May 25, 1976, and is basically an exposition of its view of the law--an exposition which should have been written as an initial prehearing memorandum.

When all is said and done, it is apparent that the government refuses now and will refuse on appeal--should there be one--to shoulder the burden of supporting, full blown, Mr. Gallina's

credibility. Absent that support, petitioner must ultimately prevail in this proceeding.

Respectfully submitted,

Allan M. Palmer
1707 N Street, N.W.
Washington, D.C. 20036
202-785-3900

Morton Katz
15 Park Row
New York, New York 10036

CERTIFICATE OF SERVICE

I hereby certify that I have mailed, postage prepaid, a copy of the foregoing to the following persons this day of July 1976.

1. Office of the Clerk
   United States District Court
   Southern District of New York
   Foley Square
   New York, New York 10007

2. W. Cullen MacDonald, Esq.
   Assistant U. S. Attorney
   One St. Andrews Plaza
   New York, New York 10007

Allan M. Palmer

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Willie Abraham,	:	
Petitioner	:	
v.	:	76 Civ. 978
United States of America	:	
Respondent	:	

Supplemental Memorandum

In our original Motion and Reply we relied heavily upon the recent case of United States v. Garcia, 517 F.2d 272 (5th Cir. 1975), for the proposition that an effective waiver of the then extant conflict of interest was not produced by Judge Bryan's inquiry of November 22, 1972.

Since this Court's order of April 15, 1976, granting a hearing into whether there was an informed consent, vel non, by petitioner to being represented by one law firm along with five other defendants, we have discovered the Second Circuit case of United States v. Armedo-Sarmiento,524 F.2d 591 (2d Cir. 1975). In Armedo-Sarmiento, supra, this Circuit apparently approved the law espoused by the Garcia court by terming that case "a well-reasoned opinion." 524 F.2d at 592.

This Circuit stated that a knowing and intelligent waiver of a conflict of interest could be effected if the district judge fully explains the nature of the conflict, the disabilities which it may place on defense counsel in their conduct of the case, and the nature of the potential claims which the defendants would be waiving should they choose to proceed with present counsel.

Conclusion

Willie Abraham's position now appears inexorable in light of United States v. Armedo-Sarmiento, 524 F.2d 591 (2d Cir. 1975), and his motion should be, accordingly, granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE:

I hereby certify that I have mailed, postage prepaid, a copy of the foregoing pleading to the following persons this day of April, 1976.

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   One St. Andrews Plaza
   New York, New York 10007

Allan M. Palmer

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Willie Abraham,

Petitioner

v.

United States of America,

Respondent

SUPPLEMENTAL MEMORANDUM

At page 13 of our original motion to vacate sentence pursuant to 28 U.S.C. section 2255, we stated without citation:

> "At the bottom line, failure to file a pretrial minimization motion on behalf of petitioner was standing alone, probably a violation of petitioner's right to effective assistance of counsel."

On August 4, 1976, the United States Court of Appeals for the Eight Circuit held that a defendant was denied the effective assistance of counsel by virtue of his lawyer's failure to file a suppression motion for which there was a clear factual basis. United States v. Easter 19 Cr. L. Reptr. 2402. The Court laid down the test that:

> "Trial counsel fails to render effective assistance when he does not exercise the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances... When he fails in the performance of his duty the proceedings may be said to have been reduced to a 'farce' and 'mockery of justice'."

Thus, if a negligent failure to file such a motion where demonstrable grounds therefor exist amounts to a denial of the effective assistance of counsel, a fortiari, such denial exists

when clear grounds for the filing of a minimization motion are present, the trial court directs counsel to file such a motion pretrial, and counsel deliberately fails to do so.

This is distinguishable from a conflict of interest situation where a defendant knows of the conflict and an adequate waiver is effected; he thereby assuming the risk of that conflicting position. An unwaived conflict of interest where there is prejudice amounts to the denial of effective assistance of counsel, it is said, because one client gains greater representation at the expense of the other.

However, a pure ineffective of counsel case produces a nugatory trial in that one cannot agree to be ineffectively represented. Thus, one cannot waive his right to a fair trial and agree to be convicted in one that amounts to a farce and mockery of justice. The Easter case is important because it equates the negligent failure to file such a suppression motion with the loss of the defendant's only viable defense -- and not a trial defense at that. Accordingly, even though Mr. Easter presumably got a fair trial by judge and jury, it was nullified because of counsel's failure to file a viable suppression motion, which omission infected the entire proceeding.

Let us assume for the purposes of argument, there was no conflict of interest herein and that Willie Abraham was the sole defendant in the case. If Mr. Galina chose the same course he did, we think it clear that Mr. Abraham would have thus been denied the effective assistance of counsel. United States v. Easter, supra.

That result cannot change or be ameliorated because instead of a negligent failure to file, there was a purposeful failure to file which inured to Mr. Abraham's detriment -- the proceedings would nonetheless still be rendered a farce and mockery of justice.

Respectfully submitted,

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Washington, D. C. 20036

Morton Katz
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New York, New York 10036

CERTIFICATE OF SERVICE

I hereby certify that I have mailed, postage prepaid, a copy of the foregoing to the following persons this 28 day of August 1976.

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2. Richard Weinberg, Esq.
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cc: Honorable Dudley B. Bonsal
United States District Judge
United States Courthouse
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Alvin Geller, Esq.
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New York, New York 10007

Mr. Willie Abraham
74394
P.O. Box 1000
Lewisburg, Penna. 17837

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILLIE ABRAHAM,

Petitioner,

v.

76 Civ. 976

UNITED STATES OF AMERICA,

Respondent.

ERROLL HOLDER,

Petitioner,

v.

76 Civ. 1424

UNITED STATES OF AMERICA,

Respondent.

ROBERT HOKE,

Petitioner,

v.

76 Civ. 2597

UNITED STATES OF AMERICA

Respondent.

WALTER GRANT,

Petitioner,

v.

76 Civ. 2598

UNITED STATES OF AMERICA,

Respondent.

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of Counsel

MEMORANDUM

BONSAL, D.J.

On October 16, 1972, Indictment 72 Cr. 1159 was filed in the Southern District of New York charging petitioners Willie Abraham, Erroll Holder, Walter Grant, Robert Hoke and fourteen others with conspiracy to violate the federal narcotics laws, with use of the telephone to further such violations, and charging Willie Abraham with managing a continuing narcotics enterprise in violation of Title 21, United States Code, Sections 846, 843(b) and 848, respectively. Following a six-week jury trial before Judge Bryan, and guilty verdicts as to all petitioners on the conspiracy count, as to all petitioners except Hoke on the use of the telephone to further the conspiracy, and as to Abraham on engaging in a continuing criminal enterprise, the petitioners were sentenced by Judge Bryan on June 26, 1973.

On May 10, 1974, the Court of Appeals affirmed the judgments of conviction on all counts and a petition for writ of certiorary to the United States Supreme Court was thereafter denied. United States v. Sisca, 503 F.2d 1337 (2d Cir.), cert. denied, 419 U.S. 1008 (1974).

Petitioners now move pursuant to 28 U.S.C. §2255 for an order vacating the sentences and granting a new trial on the grounds that they were denied effective assistance of counsel as guaranteed by the Sixth Amendment of the United States Constitution.

At the trial, petitioners and two other defendants, Alphonse Sisca and Margaret Logan, were represented jointly by the law firm of Lenefsky, Gallina, Mass, Berne and Hoffman (hereinafter referred to as the "Gallina" firm). Specifically, Abraham, Logan, and Grant were represented by Mr. Jeffrey Hoffman, Holder by Mr. John Follek, Hoke by Mr. Robert Kiernan, and Sisca by Mr. Gino Gallina.[1/]

Petitioners contend that this multiple representation created a conflict of interest which prejudiced them because counsel failed to file a pretrial minimization motion to suppress wiretap evidence, allegedly for the reason that the evidence was beneficial to defendant Alphonse Sisca. Petitioners contend that they were not made aware of what a conflict of

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1/ On appeal, Abraham, Grant and Logan were represented by Mr. Henry J. Boitel of the Gallina firm, Holder by Mr. John L. Pollok, formerly of the Gallina firm, Hoke by Mr. Robert Kiernan, and Sisca by Mr. Gino Gallina.

interest was, how it might arise in the case, or how it could lead to a bad defense. Petitioners also contend that they should have been given the opportunity to confer or consult with outside counsel prior to the conflict of interest hearing before Judge Bryan on November 22, 1972.

By Notice of Hearing dated April 15, 1976, the Court ordered an evidentiary hearing pursuant to 28 U.S.C. §2255 on the conflict of interest issue raised by petitioners Abraham and Holder. Following the hearing on May 25, 1976, petitioners Hoke and Grant, on June 14, 1976, filed similar motions to vacate their sentences. Since the Court finds the evidence produced at the May 25, 1976 hearing is applicable to the issues raised in the Hoke and Grant motions, a new evidentiary hearing will not be ordered and all four motions will be considered together.

Pre-Trial Hearing

On November 22, 1972, before the trial, Judge Bryan conducted a hearing on the Government's motion for an order resolving possible conflicts of interest arising from the multiple representation of the defendants by the Gallina law firm. During this hearing, at which petitioners were represented by Mr. Gino Gallina, a member of the Gallina firm, the Court apprised each defendant "...of the possibility of a

situation developing during the trial in which the best protection of your interests may be different from the protection of the interests of one or more of your co-defendants who is represented by the same counsel." United States v. Sisca, et al., 72 Cr. 1159 (Transcript of hearing conducted November 22, 1972 at 25) (hereinafter, Tr. 11/22/72).

Following the specific inquiries by the Court as to each defendant's understanding of the possible conflicts of interest, and after apprising the defendants of their right to have counsel of their own choosing, including separate and individual counsel, the Court concluded that each defendant had made a deliberate election of the Gallina firm in conformity with the holding of United States v. Sheiner, 410 F.2d 337 (2d Cir.), cert. denied, 396 U.S. 825 (1969). (Tr. 11/22/72 at 41).

From the transcribed record of the November 22, 1972 hearing, it appears that petitioners were informed of the conflict of interest arising from the multiple representation and that they each made a considered choice to continue with the Gallina firm as their counsel. Moreover, it appears that the trial court took steps to insure that petitioners were apprised of their right to be represented by individual counsel. (Tr. 11/22/72 at 24-31) and that the Court found each petitioner had voluntarily waived his right to be represented by individual counsel.

Indeed, the trial court cautioned the petitioners about retaining counsel from the same firm by stating:

> "I am going to say this to each of the defendants: I want you to understand that by taking the position that you do this morning, that you want to to continue with the Gallina firm representing all six of you, despite what we talked about here earlier, that you are doing this for good. You are committing yourselves now and you are never going to be able to raise this question on appeal or any other time if something develops during the trial that is unfavorable to you. You have elected to keep the Gallina firm; do you understand that?' (Tr. 11/22/72 at 35-36)

The trial court then found,

> "...that what I am going to do is to resolve the question before me this morning upon the basis that each of these defendants has freely exercised his or her choice of counsel and with full realization of the possibilities or, indeed, the probabilities that some conflict of interest may develop, they have elected to continue to have Mr. Gallina's firm represent them. The only thing I can do with such a free election is to recognize their right to make such a free choice and I will permit them to do so." (Tr. 11/22/72 at 43).

The trial court, though out this pre-trial hearing, was following this Circuit's ruling in United States v. Sheiner, supra, and, as such, the Court reasoned that petitioner's choice of counsel should not be disturbed. See United States v. Armone, 363 F.2d 395, 405-06 (2d Cir.), cert. denied, 385 U.S. 957 (1966), United States ex rel. Davis v. McMan, 386 F.2d 611 (2d Cir. 1967), cert. denied, 390 U.S. 958 (1968).

Claims of Prejudice

As to petitioners' claim of prejudice, the trial court held a post-conviction evidentiary hearing on several motions made during the trial to suppress wiretap evidence on the grounds the Government had failed to minimize the interception of communications not subject to interception. In a published opinion, United States v. Sisca, 361 F. Supp. 735 (S.D.N.Y. 1973), Judge Bryan found that the defendants had failed to comply with the time requirements of the statute relating to suppression motions of wiretap evidence (18 U.S.C. §2518(10)(a); and had waived any right to make such motions after trial had commenced since there was ample time for such motions during the pre-trial discovery.

Judge Bryan's findings were later affirmed by the Court of Appeals in United States v. Sisca, 503 F.2d 1337 (2d Cir.), cert. denied, 419 U.S. 1008 (1974), "...on the ground that appellants waived their right to challenge the admissibility of the wiretap evidence by deliberately refusing to raise the failure to minimize claim in a pretrial motion." Id. at 1347.

The Court of Appeals also held that:

> "...appellants, by ignoring the district court's explicit directive to make their minimization motions before trial, elected to pursue a trial strategy of intentional relinquishment of a known right and the deliberate by-pass of the orderly and timely suppression procedure provided by Section 2518(10)(a). In doing so, they waived their right thereafter to challenge the admissibility of the wiretap evidence. Cf. Kaufman v. United States,

394 U.S. 217, 227 n.8 (1970); Henry v. Mississipi, 379 U.S. 443, 450-51 (1965); Fay v. Noia, 372 U.S. 391, 438-39 (1963)." Id. at 1349.

The May 25, 1976 Hearing

At the evidentiary hearing on May 25, 1976, Mr. Gino Gallina testified that he had several conferences with the petitioners prior to trial, that the subject of conflict of interest and joint representation was discussed more than once, and that he met with the petitioners on the morning of November 22, 1972, prior to the hearing before Judge Bryan, and that he discussed conflict of interest and joint representation. (Transcript of hearing conducted May 25, 1976 at 106-112: 133-34) (hereinafter Tr. 5/25/76). Mr. Gallina also testified that he represented Mr. Alphonse Sisca at trial (Tr. 5/25/76 at 112), and that he represented all the petitioners at the hearing on November 22, 1972 because he was the one attorney in the firm who was free that morning. (Tr. 5/25/76 at 133-34).

Petitioners Abraham and Holder testified that they, along with petitioners Grant and Hoke, attended a meeting with Mr. Gallina on the morning of November 22, 1972 at which time Mr. Gallina informed them of a hearing to be held later that morning on the Government's motion for a hearing to resolve possible conflict of interest questions. (Tr. 5/25/76 at 26-28; 48-49). 2/

2/Mr. John L. Pollok testified at the May 25, 1976 hearing that he discussed the subject of joint representation and conflict of interest with petitioners Holder, Grant and Hoke, among others, approximately two or three days prior to trial and that all three petitioners indicated that they understood about the conflict of interest

Under the Sixth Amendment's guarantee of the right to assistance of counsel in criminal cases, petitioners are entitled to representation free from conflicting interests. Glaser v. United States, 315 U.S. 60 (1942). Indeed, where the trial court becomes aware of a potential conflict of interest, it should:

> "...conduct a hearing to determine whether there exists a conflict of interest with regard to defendant's counsel such that the defendant will be prevented from receiving advice and assistance sufficient to affort him the quality of representation guaranteed by the sixth amendment. In addition, the trial judge should see that the defendant is fully advised of the facts underlying the potential conflict and is given an opportunity to express his or her views." United States v. Alberti, 470 F.2d 878, 881-82 (2d Cir. 1972), cert. denied, 411 U.S. 919 (1973).

This is precisely what Judge Bryan did on November 22, 1972.

On the other hand, the Sixth Amendment also gives protection to a defendant's selection of retained counsel, United States v. Armedo-Sarmiento, 524 F.2d 591-92 (2d Cir. 1975); United States v. Wisniewski, 478 F.2d 274 (2d Cir. 1973); United States v. Sheiner, 410 F. 2d 337 (2d Cir.), cert. denied, 396 U.S.825 (1969), and, indeed, "...the right to manage one's own defense is at the heart of the Sixth Amendment's guarantees." United States v. Armedo-Sarmiento, supra at 592, citing Faretta v. California, 422 U.S. 306 (1975).

2/cont.d
but still wanted to continue with the Gallina firm. (Tr. 5/25/73 at 77-78, 80).

Here, the trial court, at the request of the Government, conducted a hearing within the guidelines of United States v. Sheiner, supra, and United States v. DeBerry, 487 F.2d 448 2d Cir. 1973) to determine whether defendants understood the possibility, and, in fact, the probability of a conflict of interest arising out of joint representation, and the right of each defendant to be represented by individual counsel of his own choosing. Only after the trial court had questioned each defendant individually at some length did the court conclude that the defendants had elected to continue with the Gallina firm as retained counsel. (Tr. 11/22/72 at 43).

On the record produced at the November 22, 1972 conflict of interest hearing and at the evidentiary hearing on May 25, 1976, the Court finds that petitioners elected to continue with members of the Gallina firm as their counsel at trial and that in doing so they were knowingly exercising a right guaranteed to them by the Sixth Amendment. See, United States ex rel. Davis v. McMann, supra, United States v. Armone, 363 F. 2d 395, 405-96 (2d Cir.), cert. denied, 385 U.S. 957 (1966). It appears that the trial court carefully questioned each petitioner as to his desire to continue with the Gallina firm after pointing out the possibilities of conflicts of interest and that, under the circumstances, the trial court protected petitioners' constitutional rights to effective assistance of counsel.

As to the alleged claims of prejudice arising from the failure to file a timely minimization motion, the Court finds that this issue was fully explored on appeal, United States v.

Sisca, 503 F. 2d 1337 (2d Cir.), cert. denied, 419 U.S. 1008 (1974), that the decision not to file a pre-trial minimization motion was a deliberate trial tactic, and that further discussion of this issue is not warranted here.

Accordingly, the Court denies petitioner's motions to vacate their sentences and/or grant a new trial.

It is so ordered.

Dated: New York, N.Y.
September 13, 1976

DUDLEY B. BONSAL
U.S.D.J.